

**University of Nairobi**  
**Institute of Diplomacy and International Studies**

**International Child Adoption: An examination of Kenya's  
Implementation of International Standards since 1990.**

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**R50/P/9272/04**

A Research Project submitted in partial  
fulfillment of The Degree of Master of Arts in  
International Studies.

**October 2008**



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**Declaration**

This dissertation is my original work and has not been presented for a Degree in any other University.

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This dissertation has been submitted for examination with my approval as University Supervisor.

Professor Makumi Mwangi ..... *M Mwangi* ..... Date *10/11/08* .....

## **Acknowledgements**

I want to thank my supervisor Prof. Makumi Mwangi for his patience and guiding me through his professional and intellectual insights.

The administrative assistants at the Institute of Diplomacy and International Studies for always being kind to book for me appointments with the professor.

My colleagues Peter Kaloki, Rachael Were, Martine Kazenga, James Kioko and John Onganda for their encouragement whenever I felt like giving up.

My wife Mary Moraa for her support and being able to put up with my complaints and late nights.



## **LIST OF ABBREVIATIONS**

- AIDS - Acquired Immune Deficiency Syndrome
- BIP - Best Interest Principle
- CBK - Central Bank of Kenya
- CRC - Convention on the Rights of the Child
- GDP - Gross Domestic Product
- HIV - Human Immuno Virus
- OAU - Organisation of African Unity
- OVC - Orphaned and Vulnerable Children
- SPSS - Statistical Package for Social Science
- UN - United Nations

# CHAPTER ONE

## **Introduction**

This study examines the role of international adoption in child protection and the international instruments that regulate the process in Kenya. The study will focus on the laws, policies and procedures that are used to regulate international adoption. It evaluates Kenya's compliance with international standards and instruments in child adoption. The time frame from 1990 is significant because this is when the United Nations Convention on the Rights of the Child (CRC) came into force in many countries. Kenya ratified the convention on 30<sup>th</sup> July 1990, and soon after begun the writing of a new act to transform the principles of the convention into Kenyan laws in the form of the Children Act 2001 which became operational on 1<sup>st</sup> March 2002 leading to the repealing of the Children and Young Persons Act and the Adoption Act. The Children Act 2001 made provisions for international adoption which was not well defined in the repealed Adoption Act.

## **Background to the study**

International adoption is increasingly becoming popular. Countries in Africa have basically played the role of sending states rather receiving states in international adoption. This has been attributed to the poverty levels where many families cannot support their children or children orphaned by HIV/AIDS scourge hence the only option for their survival is adoption. There is a growing philanthropic attitude of most westerners to save African children from calamities. Kenya has undergone rapid economic, social and political changes since independence. Some of the changes have negatively impacted on the population, particularly the decline in economic growth. The Gross Domestic Product (GDP) grew by 0.4

per cent compared to 1.4 per cent in 2000 and 1.7 per cent in 1999<sup>1</sup>. This resulted in massive unemployment levels, low income per capita and a majority living on less than a dollar per day and it is estimated that currently, 46% of Kenyans live in absolute poverty<sup>2</sup>. This has greatly compromised the ability of citizens to provide basic needs like shelter, food, medical care, and education. The scourge of HIV/ AIDS has also wiped out many able-bodied individuals in society, guardians and parents, leaving very many children orphaned. All these factors combined have made the Kenyan child very vulnerable and needing special interventions. The government has the primary duty of providing social welfare services for its citizens, and especially children. However, the Kenyan government has been extremely handicapped in this respect. This responsibility has fallen to civil society organizations, the community and individuals who have started child welfare institutions that offer substitutes to family life. The community safety net that was relied on to care for children has also broken down and the extended family is no longer functional as it used to be. This has consequently provided fertile ground for adoption, particularly by foreigners.

### **Statement of the Research Problem**

Child adoption, particularly inter-country (international) adoption has been proposed as an effective alternative intervention to offer thousands of children from the south, a second chance in life. Thousands of couples in the economically advanced and advantaged countries in the north have demonstrated an eagerness to offer permanent homes to many of these children through adoption. Adoption is a personal, sensitive and at times controversial issue. However, it can no longer be ignored and wished away as the number of orphaned and vulnerable children is on the increase due to high levels of poverty, HIV/AIDS scourge, displacements during conflicts and natural disasters. Kenya due to its proximity to countries in conflict plays host to a large number of unaccompanied minors from Sudan, Ethiopia, Somali, Rwanda and Burundi.

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<sup>1</sup> Central Bank of Kenya: *Monthly Economic Review* – March 2001.

<sup>2</sup> Central Bureau of Statistics, Kenya Integrated Budget Household Survey (KIBHS), 2007

These children also need special care, and international adoption has been touted to be the best alternative. Being resident in Kenya, they must be subjected to the existing adoption laws. Adoption is thus increasingly becoming an intervention of choice for many individuals, child welfare organizations and governments for vulnerable children.

Owing to the nature of inter country adoption where children cross international borders, it is important to have international standards to ensure that the welfare of the child is safeguarded in the whole adoption process. The standards will ensure that states cooperate with one another in a structured manner to ensure that the principle of best interest of the child is upheld. Different cultures, law regimes, child and human trafficking, trade in human parts, paedophilia and various forms of abuse put children, and particularly adopted ones, at great risk. It is thus important that countries put up structures in line with international laws to protect children in inter-country adoption. Children indeed have a problem and there is the need to ensure that their rights are promoted and protected.

This study investigates the international legal instruments available to regulate adoption, any cooperative regimes between states and particularly how Kenya has been able to operationalise the standards and practices.

### **Objectives of the study**

Broadly, the study aims to create awareness on international adoption and the need for international instruments to regulate the process and to ensure that children who are adopted are protected. Specifically, the study aims to identify the international instruments and cooperation regimes in regulation of international child adoption and their effects on child protection. It also aims to determine the extent to which Kenya has set up structures to ensure compliance with international adoption regimes and how this has enhanced child protection.

## **Significance of the study**

The results of the study will be useful to Kenya's Children's Department in monitoring the process with an aim of improving and enhancing its policies and regulations. This will particularly help in developing procedures and good practices in child adoption. The study will be of particular benefit to the adoption practitioners (both local and international) including adoption societies, lawyers that specialize in adoption, adoptees and child rights and child welfare organizations. The study will highlight issues of concern that could be used to enrich the current procedures. The study will also benefit the current and prospective international adoptive parents. It will highlight issues that will be of concern to the current parents and that will inform prospective parents of what to expect. The study will evaluate issues in international adoption and could help improve the lot of children leaving this country. Human rights violations and child abuse are currently burning public issues hence a study to shed any light on them is necessary.

## **Literature Review**

Adoption as an alternative child care strategy is provided in Article 21 of the 1989 United Nations Convention on the Rights of the Child which provides for safeguards in ensuring that the process is done correctly and the rights of the child are upheld. It also allows bilateral and multilateral agreements to safeguard the child.<sup>3</sup> Kadushin argues that adoption entails an individual becoming a parent through a legal and social process rather than through biological process and provides a permanent substitute care for the child when his/her own natural parents are unable or unwilling to care for him or her.<sup>4</sup> It is a process by which a permanent legal relation is created between parent and child. It is a judicial proceeding requiring a hearing before a judge. Once an adoption order is granted by a court, it is irrevocable. Kadushin traces the origins of adoption to ancient Greeks and Romans where adoptions were arranged to acquire an heir,

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<sup>3</sup> United Nations Convention on the Rights of the Child, 1989

<sup>4</sup> Kadushin, Alfred, *Adopting Older Children*, Columbia, Columbia University Press, 1970. p.1

perpetuate family name or give continuity in the family line. He further posits that the Indians conducted adoptions to provide male children to meet demand of religious ceremonies.<sup>5</sup> Adoption then put emphasis on the parents' rights and interests. Today however, legislation is concerned with protection of the child. The institution of adoption is supported now because it meets the needs of children. Its orientation has moved from providing children for childless parents to that more concerned with providing parents for parentless children.<sup>6</sup>

There is great controversy about the benefits and dangers of international adoption. A number of reasons have been given to defend or to criticize the massive outflow of children from the south (Africa and Asia in particular) to Europe and America for adoption. Hardliners have argued that it is an ultimate exploitation to take children born to the poor and powerless by rich and powerful classes in the developed countries. Rios Kohn argues that opponents of international adoption not only question the legitimacy of the adoption process, but also raise the ethical dilemma of depriving children of their national heritage and culture.<sup>7</sup> The opponents further argue that inter country adoption leads to a separation of children not only from their birth parents, but their racial, cultural and national communities.<sup>8</sup> Adopted children become minorities, questions of race and identity development in cross cultural adoption are concerns raised, and children are seen to be condemned to psychological status of refugees.<sup>9</sup> Serbin contends that international adoption is seen as cultural genocide and the ultimate form of imperialism leading to loss of human resource.<sup>10</sup> The question thus is whether international adoption is in the best interest of the child as is stated in the United Nations Convention on the Rights of the Child. Proponents of inter country adoption however posit that the developed countries have a lot of

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<sup>5</sup> Ibid p.2

<sup>6</sup> Ibid p.2

<sup>7</sup> Rios – Kohn, R., 'Intercountry Adoption: An International Perspective on the Practice and Standards'. *Adoption Quarterly* 1 (4), 1998 pp.3-32

<sup>8</sup> Kadushin, 1970. p.2

<sup>9</sup> Ressler, E. M, Boothby, N and Steinbock, D. J. *Unaccompanied Children: Care and Protection in Wars, Natural Disasters and Refugee Movements*, New York, Oxford University Press, 1998.

<sup>10</sup> Serbin, L. A., 'Research on International Adoption: Implications for Development Theory and Social Policy'. *International Journal of Behavioural Development* 20(1), 1997. pp.83-92.

resources that a child from the least developed countries could benefit from. Those against however argue that protection and promotion of child rights goes beyond the availability of resources and the subsequent provision of basic needs. Ngabonziza argues that poverty in this case is not (and should not be) a reason for adoption.<sup>11</sup>

The opponents argue that child abuse, defilement, child pornography among other child rights issues are on the rise in the developed countries. It is further noted that some western countries have legalized same sex marriages and allow them to adopt, a concept that is alien to most poor developing countries, particularly Kenya. Child trafficking and trade in human body parts is on the rise and international adoption is seen as a fertile ground for this vice, hence a greater risk of violation of the rights of the child. The proponents of international adoption have countered that those against it concentrate on its negative potential. To them, the extremists have turned their backs on the dangers of children growing up in deprived conditions. They argue that most countries have laws that protect children particularly adopted ones, and abuse can occur even to children who live with their natural parents.

Adoption was initially seen as an unproblematic solution to the problems facing some children.<sup>12</sup> Politicians and the media sometimes present adoption as a simple matter of matching the right (loving) adoptive parents with the right (needy) child.<sup>13</sup> Bartholet argues that for most of the homeless children of the world, international adoption presents the only realistic opportunity for permanent families of their own.<sup>14</sup> It should be considered only if the child cannot be suitably placed in his or her own country.<sup>15</sup> International adoption is a very important part of the total adoption picture. How various nations of the world shape the rules

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<sup>11</sup> Ngabonzinza D, 'Moral and Political Issues Facing Relinquishing Countries'. *Adoption and Fostering* 15 (4) 1991. pp.75-80.

<sup>12</sup> Douglas, Anthony & Philpot, Terry (Eds), *Adoption: Changing Families, Changing Times*, London Routledge, 2003. p. 1

<sup>13</sup> *Ibid* p.2

<sup>14</sup> Bartholet, Elizabeth, 'International Adoption: Current Status and Future Prospects', *The Future of Children Adoption Vol. 3 No. 1* Spring 1993. pp. 89-103

<sup>15</sup> Hodgkin, R and Newell P, *Implementation Handbook for the Convention on the Rights of the Child*, UNICEF 2002

governing international adoption will define to a great degree adoption's future role as a parenting alternative. This is because the world divides in essentially two camps for adoption purposes: one consisting of countries with low birth rates and small numbers of children in need of homes, and the other consisting of countries with high birthrates and huge numbers of such children.<sup>16</sup>

In this debate, there are those who believe that international adoption is the best solution for children. Others on the other hand do not feel the same and believe it is a form of abuse and denial of rights. As a result of political pressure and rising nationalism, there has been growing hostility to international adoption in many countries that have been previously willing to free some of the homeless children for adoption by foreigners<sup>17</sup>. There have been growing concerns of new trends of child abuse particularly in developed countries. Child pornography, cyber sex, trade in body parts, child prostitution all have made many developing countries reluctant to endorse inter country adoption. Countries which operate in accordance with Islamic law do not recognize adoption at all.<sup>18</sup> The Working Group on Contemporary Forms of Slavery noted with concern the "inadequacy of existing laws in protecting children who are adopted, a situation which has led to abuses such as exploitation through domestic labour particularly of the girl child".<sup>19</sup> It further noted potential misuse of inter country adoption for purposes of trafficking, inter alia for economic and sexual exploitation.<sup>20</sup>

According to Varma, the solution for children deprived of their natural parents must be viewed against the available alternatives, that is, long term fostering and adoption versus institutional care.<sup>21</sup> He notes that expert opinion shows that adoption provides the richest opportunity for family life.<sup>22</sup> He however cautions that there are factors such as adoptive families or infertile couples being

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<sup>16</sup> Bartholet, Elizabeth, 'International Adoption: Current Status and Future Prospects', *The Future of Children Adoption Vol. 3 No. 1 Spring pp. 89-103*

<sup>17</sup> Ibid

<sup>18</sup> Hodgkin and Newell, P, *Implementation Handbook for the Convention on the Rights of the Child*, UNICEF 2002 p. 295

<sup>19</sup> Ibid

<sup>20</sup> Ibid

<sup>21</sup> Varma, V. P. (ed) *Stress in Children*, London, University of London Press 1973. pp 72-73

<sup>22</sup> Ibid



viewed as minority groups in the society, the prejudices of communities and attitudes towards adoption and the development aspects of the adopted children particularly in the adolescent stage.<sup>23</sup>

The concept of creating uniformity and cooperation between all parties, agencies and states to guarantee rights of children through adoption has been a major theme in many countries in recent years.<sup>24</sup> The effort to compare adoption laws is also part of an overall desire to create uniformity, protection of children and cooperation.<sup>25</sup> The most ambitious and potentially productive global effort made thus far to regulate international child adoption practices and create cooperation between countries is the Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption. It signified a global community approach to international adoption concerns and cooperation and recognizes that private, partisan competition and unregulated adoption work cannot continue without establishing proper international childcare principles.

The Hague Convention is designed to protect adopted children and promote international cooperation regarding inter-country adoption.<sup>26</sup> It was based on the United Nations Convention on the Rights of the Child and United Nations Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children with Special Reference to Foster Placement and adoption, Nationally and Internationally. Codified measures ensure that inter-country adoptions are made in the best interests of the child with respect to fundamental rights and to prevent abduction, sale and trafficking in children<sup>27</sup>. The convention affirmed that inter-country adoption may offer the advantage of a permanent family to a child for which a suitable family cannot be found in his or her country of origin.

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<sup>23</sup> Ibid

<sup>24</sup> Jaffe, Eliezer D (Ed) *Intercountry Adoptions: Laws and Perspectives of "Sending" Countries*, Martinus Nijhoff Publishers, Dordrecht, 1995. p.11

<sup>25</sup> Ibid p. 11

<sup>26</sup> Ibid p. 12

<sup>27</sup> Ibid p. 12

Savitri Goonesekere<sup>28</sup> argues that children's rights have been developed in post war decades and that a strategy of rights can be integrated into policy planning so as to achieve the goal of justice for children. He further posits that there are those who argue that the concept of rights is relative and must necessarily be interpreted differently according to the social, economic and cultural context of a particular country. That is, differences are emphasized and recognized as a reflection of different societal needs; it is thus easy to conclude that there must necessarily be varying concepts of rights, different models of justice in the community of states. However, it must be recognized that the world has become globalised in terms of distances, human interactions, communication and it is meaningful to speak in terms of universal norms and standards that are relevant for all children<sup>29</sup>. There is therefore great variation among states in the way they deal with international adoptions. Some countries prohibit international adoption, and others place special restriction on it. Many of the laws and policies are not designed to accommodate its unique features, and therefore effectively prevent many prospective parents who would be interested in adopting across borders.<sup>30</sup>

The inter-country adoption debate is intertwined with the rights of the child movement. The basic question asked is whether children have rights. If so, whether they have all the rights that adults have and if they have rights that adults do not have, and if they do not have rights how it can be ensured that they are treated in the morally right way.<sup>31</sup> A distinction should be made between positive rights, those that are recognized in law, and moral rights, those that are recognized by some moral theory.<sup>32</sup> Most jurisdictions accord children legal rights but use different approaches or theories in granting those rights. There are two major schools of thought in children rights debate. In one camp is the will or choice theory and the other camp is the welfare or interest theory. In the interests

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<sup>28</sup> Goonesekere, Savitri, *National Policies on Children's Rights and International Norms* in Asquith, Stewart and Hill, Malcolm (Eds) *Justice for Children*, Dordrecht, Martinus Nijhoff Publishers, 1994 pp 73-83

<sup>29</sup> Ibid p. 74

<sup>30</sup> Bartholet, Elizabeth, 'International Adoption: Current Status and Future Prospects' *The Future of Children Adoption*. p. 91.

<sup>31</sup> Stanford Encyclopedia of Philosophy, Children Rights, 2002. p. 1

<sup>32</sup> Ibid p.2

theory, there is a need to distinguish between interests as persons, as children, as juveniles and future adults.<sup>33</sup> It sees a right as the protection of an interest of sufficient importance to impose on others certain duties whose discharge allows the right holder to enjoy the interest in question.<sup>34</sup> If rights are defined on the interest theory of rights, as interests protected by laws or other normative rules or standards, and assuming children have interests, it then follows they have rights<sup>35</sup>.

The theory of will/power or choice posits that capacity is the core, and that children cannot bear rights because of their incapacity for reasoned decision making.<sup>36</sup> Power theorists see a right as a normative capacity that the bearer may choose to use for the furtherance of his/her own interests, a mechanism for invoking, waiving, claiming, demanding, a right hence excludes children.<sup>37</sup> This view is based on the thoughts of Thomas Hobbes, John Locke and John Stuart Mill who invariably believed in the ultimate value of personal choice, which children do not have, children seen as the property of their parents, their treatment being the sole discretion of their parents. This theory allows for a proxy like a parent to exercise right on behalf of a child and has also been referred to as a caretaker thesis where self determination is too important to be left to children.<sup>38</sup> However, child liberationists, like Aries have shown the conception of children as possessing a separate nature and meriting a separate world<sup>39</sup>, where there are rights which guarantee children certain forms of treatment. Child liberationists (as do interest theorists) believe in the alleged incapacity and vulnerability of the children – their inability to look after themselves – which

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<sup>33</sup> Campell, Tom D, *The rights of the minor: As a person, as child, as juvenile, as future adult* in Alston, P; Parker, S; and Seymour, John (eds) *Children, Rights and the Law*, Oxford, Clarendon Press, 1992. pp 1-23

<sup>34</sup> Stanford Encyclopedia of Philosophy, p.3

<sup>35</sup> Alston, P et al (1992) p.2

<sup>36</sup> Child Liberationism and Legitimate Interference, Morrice Lipson, Peter Vallentyne, *University Journal of Social Philosophy* 23 (1992): 5-15

<sup>37</sup> Campell, Tom D, *The rights of the minor: As a person, as child, as juvenile, as future adult* in Alston, P; Parker, S; and Seymour, John (eds) *Children, Rights and the Law*, Oxford, Clarendon Press, 1992. pp 1-23

<sup>38</sup> Ibid p.52

<sup>39</sup> Ibid p.47

requires that they be given those rights.<sup>40</sup> That is, the best interest of the child principle should always guide all actions of individuals and state.

The interest theorists thus see rights as deriving from interests which must be protected and in subsequently children have rights. This paradigm imposes certain duties on individuals to act in particular ways towards children. This paradigm, also seen as a welfare approach to rights means children rights must be codified into enforceable, normative standards, both at the national and international levels. The opposing paradigm of will or power theory on the other hand sees children as having no rights and are dependent on their parents (adults) who can act as proxies on their behalf. This view portrays children as lacking capacity for reasoning hence having no ability to make informed choices. Children cannot waive, demand or exercise any of their rights. This is a caretaker thesis where parents (adults) act on behalf of children.

Rights scholars have not unanimously agreed whether children have distinctive rights and if children should be accorded all the rights that adults have or whether they should have less or more of the rights adults possess. Another contention is how the rights should be protected or granted if they exist at all. The power or will theorists argue that rights for children should be protected by the proxies in this case adults or carers; interest theorists on the other hand insist that children have distinct rights to be protected through normative standards. Each and every action taken by individuals or the state should be guided by the best interest of the child principle. Further, a debate arises on what constitutes the best interest of the child particularly due to the variations of cultures across the world. The way African communities treat and view children is principally different from the situation in the United States or United Kingdom. The best interest cannot be easily universally defined.

Debate and contention rages on the role of international adoption in promoting the rights of the child. Pro international scholars like Bartholet argue that the west has wealth that could be exploited for the benefit of children from poor countries. It is seen as a viable, honorable solution to meet needs of

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<sup>40</sup> Ibid p.47

innocent, impoverished children<sup>41</sup>. Ngabonziza who is against international adoption argues that poverty is not a reason for (international) adoption<sup>42</sup>. International adoption is seen as cultural genocide, ultimate form of imperialism and raises the ethical dilemma of depriving children of their national heritage and culture<sup>43</sup>. The child's culture is seen here in terms of her/his human rights.

There are many endless arguments for and against international adoption, whether it enhances and promotes the best interest of the child or not. These include the good prospects it offers to the children, the lack of legal mechanisms to ensure child protection, the abuse and the joy it brings families and the children. Whichever side one takes, there must be a way to regulate this process just like any other activity that involves transactions between individuals, agencies and states.

This study adopts the view of the best interest of the child principle. International adoption should be done in a way to ensure that it provides for the most and highest value in terms of promoting the rights of the child. States and individuals thus have obligations to protect the internationally adopted children for the simple reason that they are vulnerable and unable to claim for their rights, particularly in a foreign country. This can only be done with set normative rules that provide for standards that must be met to ensure child protection.

### **Theoretical Framework**

This study adopts the interest or will theory of children rights, which see right as the protection of an interest of sufficient importance. Children have certain fundamental rights meriting protection and thus have welfare rights. Campbell argues that there are rights peculiar to children, and the best interest of the child should determine how they are treated by parents, states and others.<sup>44</sup> The

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<sup>41</sup> Serbin, L. A 1997. Research on International Adoption: Implications for development theory and social policy. *International Journal of Behavioural Development* 20 (1); 83-92

<sup>42</sup> Ngabonziza, D 1991. Moral and Political Issues facing relinquishing countries, *Adoption and Fostering* 15 (4) 75-80

<sup>43</sup> Rios - Kohn 1998

<sup>44</sup> Campell, Tom D. *The rights of the minor: As a person, as child, as juvenile, as future adult* in Alston, P; Parker, S; and Seymour, John (eds) *Children*

protection of the interests (rights) of the child should impose certain duties on society whose discharge allows the child (in this case right holder) to enjoy the interests and rights in question.

The basic premise of this theory is the best interest principle. The child has interests that can be isolated from others in society, and as such this should guide every action taken by individuals and states. This ensures that minimum acceptable standards of treatment for children are observed. This implies that the duty to secure these interests initially lies with the parents, but the state may intervene or require compliance with minimum standards. The interest theory posits that failure to give rights may be harmful to children and the society as a whole. The interest theory thus implies the need to have codified standards/measures, legally enforceable that impose duties on states and individuals, in this case need for international standards.

Without cooperation and enactment of laws in countries that carry out international adoption, rights for the child which are human rights will not be achieved, greatly compromising human welfare. Julius Stone posits that one complex layering of international law are those issues centered on the individual human beings, that is, their conditions of physical life, their demands, aspirations and expectations<sup>45</sup>. Children might not have these if strictly defined, but they have interests that must be protected through the international system.

### **Hypotheses**

- i) The practice of international adoption leads to the promotion and protection of the rights of children.
- ii) That the existing international legal regimes are limited in their protection of internationally adopted children.
- iii) The structures put up by Kenya are adequate in ensuring protection of internationally adopted children.

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<sup>45</sup> Stone, Julius *A Sociological Perspective on International Law* in Macdonlad, R. & Johnston D. M (eds) *The Structure and Process of International Law*, Dordrecht, Martinus Nijhoff Publishers, 1983. pp 263-293

## **Research Methodology**

The study will be based on a case study of Kenya. It adopts the qualitative research design to evaluate how Kenya has implemented international instruments that aim to promote and protect the rights of internationally adopted children.

The study relies on primary and secondary sources of information. Primary data will be derived from adoption practitioners namely lawyers specializing in adoption, social workers and administrators of adoption societies, those who have adopted and an officer in charge of adoption at the children's department. The primary data will be gathered through face to face or personal interviews with the sources listed and use of questionnaires. Further, a focused group discussion will be conducted with the adoptive parents. Specifically, the study adopts the non-structured or nondirective interview. Gathering data through interviews is flexible as it will allow for probing and questioning suiting the interviewee. It will enable the researcher have greater control and get raw data and information that is unadulterated. The researcher having been a child rights practitioner already has contacts in the field hence possibility of a high response rate. The subject of the study is a human relations matter and face to face interviews will be important in gathering insights and individual experiences.

A limitation of this approach is that it would be difficult to interview directly those who have adopted and those who have been adopted. This is because of the confidential and private nature of adoption and the need to protect the identity of the individual. Most adoptees and adopters live abroad and might be difficult to reach them. It is also time consuming and a costly way of gathering data.

Secondary data on the other hand will be derived from literature already published on the subject. This is in textbooks, policy papers, periodicals, journals, magazines and newspapers. The data so gathered will be analyzed through content analysis. Secondary data allows for comparative analysis and is cheaper to execute. A limitation of secondary data is envisaged to be in its availability and

accessibility. There may not be many studies having been done in regard to international adoption and particularly the Kenya case. In order to sift, organize, summarize and synthesize the data collected in the study will adopt qualitative and quantitative data analysis.

### **Chapter outline**

Chapter one introduces the topic under research and sets out the statement of the research problem, justification, hypotheses, objectives and justification. Also in the chapter is the literature review and theoretical framework to be used in the study. Chapter two provides an analysis of international child protection regime focusing on the international instruments and the specific provisions relating to adoption. It also contains an overview of the current practice of international adoption in Kenya. Chapter three is an overview of the institution of adoption as a strategy for protection and care for vulnerable children. It highlights its principles, philosophy, its elements and relation to culture and migration. Chapter four presents the case study of implementation of international adoption standards in Kenya. It highlights major outcomes and issues of the study.

Chapter five is a critical analysis of the outcome of the study and policy recommendations. Chapter six is a retrospective reflection of the adoption process focusing on how it has evolved from the past to present.



## CHAPTER TWO

### **International Child Protection Regime**

This chapter highlights the historical development of international child protection treaties and laws. The chapter differentiates International Law and Municipal Law. It discusses the historical origins of the United Nations Convention on the Rights of the Child, Hague Convention on inter – country adoption and the African Charter on the Rights of the Child. It also provides for an overview of the adoption process as provided in the Children Act 2001.

### **International Law and Municipal Law**

#### **International Law**

International law consists of rules and principles which govern the relations and dealings of nations with each other. In some countries it is referred to as Public International Law and concerns itself with questions of rights between several nations or nations and the citizens or subjects of other nations. Necessity of international law arises from the need to ensure a process that regulates competing demands and establishes a framework for predictable and agreed community behaviour among countries. It identifies states as the principal actors in the international legal system, states have control over territories and jurisdictions and states are sovereign and theoretically viewed as equal.

Starke defines international law as that indispensable body of rules regulating for the most part the relations between states, without which it would be virtually impossible for them to have a steady and frequent intercourse<sup>1</sup>. International law today has developed due to growing interdependence of states, and of the vastly increased intercourse between them due to all kinds of inventions that overcame the difficulties of time, space and intellectual communication<sup>2</sup>. It derives from international agreements and may take any form

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<sup>1</sup> Starke, J., G., *Introduction to International Law*, Tenth Edition, Butterworths, London 1989. p.15.

<sup>2</sup> *Ibid.* p.15

that the contracting parties agree upon and imposes certain duties upon states with respect to individuals. In the case of international adoption, it imposes certain duties upon the state in respect to protection of children.

### **Municipal Law**

There is debate on the relationship between a country's internal legal order and the rules and principles governing international community. Municipal law governs the domestic aspects of government and deals with issues between individuals, and between individuals and the administrative apparatus while international law focuses primarily on relations between states. Some countries develop their municipal laws from international law in a domestication process. Kenya wrote a fresh the Children's Act in 2001 incorporating provisions on the CRC. It did this by repealing the Children and Young Persons Act and the Adoption Act. Similarly, Kenya developed the Anti Corruption and Economic Crimes Act after ratifying the UN Convention on Corruption Against Corruption (UNCA) 2003. This is a case of writing laws to conform to international standards. Other countries however argue that international instruments must conform to provisions of their internal legislations before they can ratify or accede. The United States has so far not ratified the CRC, in part due to potential conflicts with the constitution and because of opposition by some political and religious conservatives to the treaty<sup>3</sup>.

### **Sources of International Law**

Article 38 (1) of the Statute of the International Court of Justice outlines the sources of international law<sup>4</sup>. These are International Treaties or Conventions; International Custom; general principles of law recognised by civilized nations; and judicial decisions and teachings of qualified publicists and soft law. Child protection instruments, the Convention on the Rights of the Child and Hague

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<sup>3</sup> Smolin, David, M. Overcoming Religious Objections to the Convention on the Rights of the Child, 'Emory International Law Review', Vol. 20 pp. 81-110

<sup>4</sup> The Permanent Court of International Justice

Convention relating to Inter Country adoption form key source of international law in child protection.

The Vienna Convention on law of Treaties, Article 1A defines a treaty as an agreement between states in written form governed by international law whether contained in a single instrument or in a series of related instruments whatever its particular designation<sup>5</sup>. Treaties are seen as more modern and deliberate methods of creating law and are sometimes known by different names like Conventions, International Agreements, Pacts, General Acts, Charters, Statutes, Declarations and Covenants. They however refer to a similar transactions, the creation of agreements where participating states bind themselves legally to act in a particular way or to set up particular relations between themselves; a series of conditions and arrangements are laid out which parties oblige themselves to carry out.<sup>6</sup> Treaties are viewed by many as the most important sources of international law as they require the express consent of the contracting parties.<sup>7</sup>

### Treaty making

The fundamental principle of treaty law is that they are binding upon parties to them and must be performed in good faith, the principle of *pacta sunt servanda* and is affirmed in Article 26 of the Vienna Convention on Treaties<sup>8</sup>. This is crucial because in the absence of a certain minimum belief that states will perform their treaty obligations in good faith, there is no reason for countries to enter into such obligations with each other.<sup>9</sup>

There is no prescribed form or procedure in how states may make or formulate a treaty. The process and who to sign it depends on the intention and agreement of the states concerned and may be drafted between states, governments, and heads of states, governmental departments or whichever

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<sup>5</sup> Vienna Convention on Law of Treaties, Article 1A

<sup>6</sup> Shaw, N. Malcolm, **International Law**, Fourth Edition, Grotius Publication, Cambridge University Press, 2004. pp.73-74

<sup>7</sup> Ibid p.74

<sup>8</sup> Vienna Convention on Law of Treaties, Article 26

<sup>9</sup> Shaw, N. Malcolm, **International Law**, Fourth Edition, Grotius Publication, Cambridge University Press, 2004. p.633

appears expedient.<sup>10</sup> Some states in their domestic law have established or given power to specific arms of government to make treaties. In Kenya, treaty making is the prerogative of the President and spear headed by the Ministry of Foreign Affairs. A treaty made or signed by a person not authorized as required will have no legal effect, unless the state involved afterwards confirms the act.

Once a treaty has been negotiated, agreed upon by authorised representatives and drafted, there are stages necessary for it to become legally binding. The text of the agreement drawn up by negotiators of the parties has to be adopted and Article 9 of the 1969 convention provides that adoption in international conferences takes place by the vote of two-thirds of the states present and voting. If not in an international conference, adoption takes place by consent of all states involved in the process. Another practice is consensus where there would be no voting until all efforts to reach agreement by consensus have been exhausted. Article 11 of the 1969 Convention provides that consent to be bound can be signaled by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession.

In addition of a signature stating intention to be bound, treaties require ratification. This is where an authorised representative of the state endorses the earlier signature through a document of ratification. A treaty will normally indicate whether ratification is needed, how many ratifications are needed before it enters into force and where the instrument of ratification is deposited. Kenya was among the first countries to ratify the CRC in 1990 after which it began the process of domesticating through a new Children's Act. A state which does not take part in the negotiation leading to signature of a treaty may become a party through the process of accession by depositing an instrument of accession. The treaty must however provide for accession. Kenya did not take part in the negotiation of the Hague convention Relating to Intercountry Adoption but acceded to the convention in March 2007 and is now bound by its provisions.

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<sup>10</sup> Ibid 636

A state may however enter a reservation to a treaty which is defined in Article 2 of the 1969 Vienna Convention as a unilateral statement, however phrased or named, made by a state, when ratifying, signing, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that state<sup>11</sup>. This is where a state is generally satisfied with most of a treaty, but is unhappy about one or particular provisions and wish to refuse or accept to be bound by such provisions while consenting to the rest of the agreement.

## **International Child Protection Instruments**

### **The 1986 United Nations Declaration**

The 1986 United Nations Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption, Nationally and Internationally in Article 17 states that,

If a child cannot be placed in a foster or adoptive family or cannot in any suitable manner be cared for in the country of origin, intercountry adoption may be considered as an alternative means of providing the child with a family<sup>12</sup>.

This article expressly provides for intercountry adoption. Though international declarations are not legally binding to states, this article provides a crucial framework that was used in development of further provisions in recognition of international adoption as an alternative to the natural family as a child protection mechanism. It sets out main concerns in international adoption as essentially to ensure adequate counselling of all involved and professional observation of the relationship between the child and the prospective adoptive parents before the adoption takes place; and stresses prevention of abduction and improper financial gain, as well as protection of the child's legal and social interests<sup>13</sup>. The

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<sup>11</sup> The Vienna Convention on the Law of Treaties Article 2 (1) d 1969

<sup>12</sup> The 1986 United Nations Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption, Nationally and Internationally, Article 17

<sup>13</sup> Intercountry Adoption, Innocenti Digest 4, United Nations Children's Fund, International Child Development Centre, Florence Italy, 1998 p. 4

provisions of this article were developed and expanded in the Convention on the Rights of the Child in 1989.

### **The United Nations Convention on the Rights of the Child**

The Convention on the Rights of the Child is an international treaty that recognises the human rights of Children, defined as persons below 18 years. It establishes in international law that State Parties must ensure that all children without discrimination in any form benefit from special protection measures and constitutes a common reference against which progress in meeting human rights standards for children can be assessed and results compared<sup>14</sup>. The standards in the Convention were negotiated by governments, non-governmental organizations, human rights advocates, lawyers, health specialist, social workers, educators, child development experts and religious leaders from all over the world over a 10 year period.<sup>15</sup>

The roots of the Convention can be traced back to 1923 when Eglantyre Jebb, founder of Save the Children, summarized the rights of children and her declaration of the rights of the child were adopted by the League of Nations in 1924 and her five points became to be know as the Declaration of Geneva.<sup>16</sup> After World War II, the United Nations produced the Universal Declaration of Human Rights which was adopted in 1948 but was found insufficient in terms of taking care of the rights of the child. Special needs of children justified an additional, separate document and in 1959, the UN General Assembly adopted the second Declaration on the Rights of the Child; which consisted of ten principles and incorporated the guiding principle of the best interests of the child.<sup>17</sup> The Declaration was however not legally binding and was just a statement of general principles and intent. The United Nations Human Rights Commission group started work on a draft of the Convention on the Rights of the Child which was completed in 1989 and convention adopted by the United

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<sup>14</sup> United Nations Children's Fund (UNICEF), Convention on the Rights of the Child, Frequently Asked Questions.

<sup>15</sup> Ibid

<sup>16</sup> Child Rights Alliance, UN Convention on the Rights of the Child

<sup>17</sup> Ibid

Nations General Assembly. It came into force on 2<sup>nd</sup> September 2007. It is the most ratified convention in the United Nations.

### **Principles of the Convention on the Rights of the Child**

Universal concern for children is viewed as transcending political and social divides (borders) and proponents of the Convention see the extension of rights to children as a natural progression from previous civil rights struggles, which recognized the equal rights of slaves, working men and women, blacks and other groups.<sup>18</sup> Codification of children's rights recognises morally valid claims of children on society and fosters institutionalization of ethical values.<sup>19</sup> International relations theorists are calling for greater moral purpose in international in international affairs and a shift towards the institutionalization of global ethics.

The international children's rights regime assumes that there is a model of childhood development that is universally applicable, that there are universal needs, and that there is a consensus both domestically and internationally on what policies should be in place to realize the best interests of the child.<sup>20</sup> It is a standard principle of child welfare law that that the best interests of a child should be promoted. Article 3.1 of the United Nations Convention on the Right of the Child states that "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration".<sup>21</sup> In this principle, overriding concerns are right of the child to survival, development, participation and protection. Children must be protected from harmful practices and must be provided with an environment that enables them to develop their capacities to the fullest.

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<sup>18</sup> Pupavac, Vanessa, *Misanthropy Without Borders: International Children's Rights Regime, 'Disasters,'* 25(2) Oxford 2001 pp.95-112

<sup>19</sup> *Ibid*

<sup>20</sup> Boyden J. (1990) *Childhood and the Policy Makers: A Comparative Perspective on the Globalization of Childhood.* In Pupavac, Vanessa, *Misanthropy Without Borders: International Children's Rights Regime, 'Disasters,'* 25(2) Oxford 2001 pp.95-112

<sup>21</sup> United Nations Convention on the Rights of the Child

There has however been controversy on the definition and interpretation of best interests principles particularly in what is to be given weight and how much weight. The best interest principle has its origins in custody disputes where the law had to make determination in respect of a couple's children; where even if there were several children, the court had to decided in respect of each individual child what was the most appropriate course of action.<sup>22</sup> Further, agreement on the scope of application of best interest principle has not been achieved. It has operated on two domains where one is the medical context when determining which option to be selected for an ill or sick child and the other context is in custody disputes following separation or divorce of parents or guardians. Due to cultural and economic disparities across the world, there is no universal standard of best interest determination. The deep cultural disagreements render the principle problematic since what is best for a child is different in different cultures, each culture has its own understanding of what is in the best interest of the child. Each country or even child welfare agencies within the same country usually conduct best interest determination based on their circumstances and those of the child.

### **Convention on the Rights of the Child and International Adoption**

Article 21 of the 1989 United Nations Convention on the Rights of the Child (CRC) specifically makes provision for adoption and sets out the basic principles to be followed when considering domestic and intercountry adoption for a child. It states that intercountry adoption may be considered as an alternative means of child care and the state party's duty is to ensure that the best interest of the child are the paramount consideration in any adoption and that safeguards and procedures are fully protected<sup>23</sup>.

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<sup>22</sup> Children's Rights, Stanford Encyclopedia of Philosophy

<sup>23</sup> Convention on the Rights of the Child, Article 21



A key event in the history of formulation of adoption regulations was the Leysin Conference of 1960 which brought together experts from the United Nations, International Social Service and the International Union of Child Welfare<sup>24</sup>. The outcome of the conference was twelve principles, main among them, the importance of protecting the best interests of the child. The principles are reflected in current policies where adoption is acceptable as long as the best interests of the child is primary, meaning that before placing a child with a foster family, assessment must be made to establish the suitability of the adopter(s) in preserving interests of the child. The second principle which has been employed today states that the search for a family for an orphaned or abandoned child should be conducted in the child's country first. Adoption, particularly international, should be a last resort and these principles formed the basis of the provision for adoption in the CRC.

To limit institutionalization, decisions to place in or outside the country of origin should be made as soon as possible. This principle is based on the need to place a child at a younger age to ensure development is not interrupted. Children placed at early ages are argued to adapt much more easily than older children. Lobo supports this view by stating that identity problem is more difficult for older children who have already formed an identity and have to change to conform to the environment.<sup>25</sup> Another principle was that every attempt should be made to find homes for the child with special needs. Special needs children are vulnerable and need special attention and care. The Leysin conference also stated that parents (and those giving up or offering children for adoption) must operate with fully informed consent. Further, they must be educated about what their child's new life might be like. These two principles are crucial particularly in Africa. Many poor parents have been duped in giving up children to rich westerners with the hope the child will receive education and return, only to

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<sup>24</sup> Bagley C; Young L.; and Scully A. 1993. International and Transracial Adoptions: A Mental Health pp.138- 144 in Working Paper Series, Child Interrupted: International Adoption in the Context of Canadian Policy on Immigration, Multiculturalism, Citizenship, and Child Rights by Zofia Sonia Worotyneć, CERIS Working Paper No. 46, Toronto, April 2006. ....p.5

<sup>25</sup> Lobo, Edwin de H, Children of Immigrants to Britain: Their health & Social Problems, Hodder & Stoughton, London, 1978 p.57

realize their children have been permanently adopted. Counseling on adoption is thus mandatory and desirable.

An adequate home study must be completed, the appropriate 'match' must be considered before placement and once a child is placed, there must be a trial supervised period to determine fitness to adopt. In the application, all documents must be legitimate and scrupulous. This aims to weed out adoption by criminals and those unfit to have children placed under their care. The conference agreed on the need that the legal responsibility for the child must be established as soon as the child is in the new country and the adoption must be deemed legal in both the sending and receiving country<sup>26</sup>. Though not implemented worldwide at the time, currently these principles run across many policies and formed part of the principles of the Convention on Rights of the Child. The Conference also called for the centralization of the administration of international adoption which is key in the 1993 Hague convention.

The CRC laid out the basic human rights to which children everywhere are entitled which are rights to provision, protection and participation. It set standards in areas like education, health and social services and states that are party to it are obligated to meet these standards. The CRC views children in a holistic manner, seeing children in the context of their families and recognizes the family as the fundamental unit of nurturance, support and guidance of the child. Article 21 of the convention provides for adoption. State parties recognize and/or permit system of adoption and shall ensure that the best interests of the child are promoted. The article states that adoption shall be conducted by authorized and competent bodies within set laws and procedures; inter-country adoption to be considered as a last resort where child cannot be placed in home country; an adopted child should enjoy safeguards and standards equivalent to those in case of national adoption and that inter country adoption should not lead to improper financial gain.

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<sup>26</sup> Bagley C; Young L.; and Scully A. 1993. International and Transracial Adoptions: A Mental Health pp.138- 144 in Working Paper Series, Child Interrupted: International Adoption in the Context of Canadian Policy on Immigration, Multiculturalism, Citizenship, and Child Rights by Zofia Sonia Worotyneć, CERIS Working Paper No. 46, Toronto, April 2006.....p.

## The Hague Convention on Intercountry Adoption (1993)

The Hague Convention on Protection of Children and cooperation in Respect of Intercountry Adoption was adopted on 29<sup>th</sup> May 1993 and entered into force on 1<sup>st</sup> May 1995. More than 60 countries and about 10 international non-governmental organizations took part in its drafting<sup>27</sup>. The Convention was developed under the auspices of the Hague Conference on Private International Law which is a global inter-governmental organization with a membership of nearly 70 Members (68 States and the European Community) representing all continents. It is a melting pot of different legal traditions, it develops and services multilateral legal instruments, which respond to global needs<sup>28</sup>. The Hague Convention is the only international instrument that specifically attempts to regulate intercountry adoption. Its principal objectives are to establish safeguards to ensure that intercountry adoptions take place in the best interests of the child and with respect for his or her fundamental rights as recognised in international law; establish a system of cooperation amongst contracting states to ensure that those safeguards are respected and thereby prevent the abduction, the sale of, or traffic in children; and to ensure recognition in contracting states of adoptions made in accordance with the convention<sup>29</sup>.

The convention was designed to principally set up a mechanism for international cooperation, recognises adoption as a social and legal measure for protection of children and that procedures for international adoption should ultimately be the responsibility of the states involved, which must guarantee that adoption corresponds to the child's best interests and respects his fundamental rights<sup>30</sup>. The Hague Conference on Private International Law was established in 1993 and is an international organization whose purpose is to "work for the progressive unification of the rules of international law and seeks to find common

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<sup>27</sup> Ibid p.5

<sup>28</sup> Hague Conference on Private International Law (<http://www.hcch.net>)

<sup>29</sup> The Hague Convention on Intercountry Adoption, Article 1

<sup>30</sup> Intercountry Adoption, Innocenti Digest 4, United Nations Children's Fund, International Child Development Centre, Florence Italy, 1998 p. 4

standards and approaches that protect the interests of its Member States<sup>31</sup>. It is governed and funded by its Member States and administered by a Secretariat that meets every 4 years. In 1993, it developed The Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption here called the Hague Convention. It was developed in a response to Article 21 of the UNCRC and sought to expand and elaborate on standards for international adoption set in Article 21. Its preamble was taken from the CRC both in language and content.

### **The Objectives of the Hague Convention**

The Convention sets out three broad objectives as to establish safeguards to ensure that intercountry adoption takes place in the best interests of the child and with respect to fundamental rights recognized in international law; establish a system of cooperation amongst contracting states to ensure safeguards are respected and prevent abduction, sale and traffic in children; and secure recognition in contracting states of adoptions in accordance with the convention<sup>32</sup>

### **Principles of the Hague Convention**

The basic principles of the Hague Convention derive from the CRC 1989 Article 21 and include the Best Interest and rights of the child; the placement of a child for inter-country adoption should be a last resort and focus on the prevention of trafficking of children and improper financial gain. Other principles include cooperation between contracting states and the central Authorities and that only Competent Authorities should authorize international adoptions.

### **African Charter on the Rights and Welfare of the Child, 1990**

This is a regional instrument that was adopted by the Organisation of African Unity (now African Union) in 1990. The charter is based on the inspiration and principles of the CRC, OAU Charter, African Charter on Human and People's

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<sup>31</sup> The Hague Conference on International Law 2005a

<sup>32</sup> Ibid

Rights, 1981; and the Declaration of the Rights and Welfare of the African Child, 1979<sup>33</sup>. The first chapter highlights the critical condition of the African child attributed to the unique factors of their socio-economic, cultural, traditional and developmental circumstances, natural disasters, armed conflict and exploitation and hunger and acknowledges that the African child needs special safeguards<sup>34</sup>. Further, the second paragraph focuses on the unique and privileged position which the child enjoys in the African society<sup>35</sup>. The charter's preamble stresses its cultural context and states that:

"Taking into consideration the virtues of their cultural heritage, historical background and the values of African civilization which should aspire and characterize their reflection on the concept of the rights and welfare of the child"<sup>36</sup>.

This brings out the fact that protection of human rights, particularly of the child should reflect the spirit of Africa's traditions and cultural values.

Adoption is provided for in article 24 of the charter and stipulates that state parties which recognise the system of adoption shall ensure that the best interests of the child shall be the paramount consideration. It specifically mandates the adoption of appropriate measures and devising of necessary safeguards in relation to both national and intercountry adoptions.<sup>37</sup> Coming into operation in 1990, this charter was developed along the lines of the CRC and adopts its key principles. Article 24 creates provisions for adoption and particularly international adoption. The charter also recognizes the central role the natural family plays in the development of the child and by extension society. It also appreciates the special circumstances of the African child in terms of culture, political, and socio-economic conditions. States Parties which recognize the system of adoption shall ensure that the best interest of the child shall be the paramount consideration. Article 24 thus implies that efforts must be made to

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<sup>33</sup> Bankole, T, Child Abuse in Sierra Leone: Normative Disparities" 1991 in Bankole, Thompson, Africa's Charter on Children's Rights: A Normative Break with Cultural Traditionalism, The International and Comparative Law Quarterly, Vol. 41, No. 2 (Apr., 1992), pp. 432-444

<sup>34</sup> Bankole, Thompson, Africa's Charter on Children's Rights: A Normative Break with Cultural Traditionalism, The International and Comparative Law Quarterly, Vol. 41, No. 2 (Apr., 1992), pp. 432-444

<sup>35</sup> Ibid p.434

<sup>36</sup> Preamble to the African Charter on the Rights and Welfare of the Child

<sup>37</sup> African Charter on the Rights and Welfare of the Child, Article 25

ensure that a child grows in the natural family and if adoption is to be considered, placement should be in the country of origin and international adoption to be considered as a last resort.

### **Kenya and Implementation of International Law**

While municipal law governs the domestic aspects of government and deals with issues between individuals and between individuals and administrative apparatus, international law focuses primarily upon the relations between states.<sup>38</sup> International conventions are contracts binding upon signatories but cannot operate of themselves within a state but require the passing of an enabling statute.<sup>39</sup> Ratification of any treaty automatically obligates a state to come up with structures that can enable the interpretation of the treaty in its jurisdiction.

In Kenya, once the state has ratified or acceded to a treaty, the practice is that the particular treaty is domesticated through an act of parliament creating a statute that will enable implementation locally. Attempts are usually made to ensure that the treaty is not in conflict with the constitution. The parent ministry under which a treaty falls first has to raise a cabinet memo requesting the government to consider ratifying or acceding to a particular treaty. After cabinet approval, it is tabled in parliament after which if there is approval, the Foreign Affairs Ministry will coordinate the process of ratification or accession after which process of developing legislation to domesticate the treaty begins. The Children Act No. 8 of 2001 is the main legal instrument employed to regulate adoption in Kenya. It replaced the Adoption Act and Children and Young Persons Act which are now repealed. The Republic of Kenya ratified the UNCRC on 30<sup>th</sup> July 1990 and thereafter domesticated it through the enactment of the Children Act, 2001, that came into force on 1<sup>st</sup> March 2002.

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<sup>38</sup> Shaw, Malcom. *International Law* (4<sup>th</sup> edition) Cambridge University Press, 1997. p.100

<sup>39</sup> *ibid* pp.110-111

## **International Adoption Practice in Kenya**

The Children Act 2001 provides for international adoption and gives a framework for conducting the same. Section 182 makes provision for the Minister to make regulations for regulating and supervising activities of adoptions; regulating international adoptions and prescribing safeguards; prescribing manner of making adoption arrangements; and prescribing any matter authorized or required to be prescribed. Subsequently, the Minister published The Children Adoption Regulations, 2005 on 20<sup>th</sup> May, 2005. Regulations 22 to 29 explicitly provide for international adoption.

### **The Adoption Committee**

This is established under Section 155 (1) of the Act and is established under Regulation 2. Its functions in relation to international adoption include to consider, review and either approve or reject applications for registration for international adoption societies, co-ordinate international adoptions and approve foreign agencies wishing to conduct adoption in Kenya, maintain and update from time to time a register of approved international societies and regulate fees charged by adoption societies for processing of applications for adoption.

### **Adoption Societies**

The Act under Section 177 (1) provides that no body of persons shall make any arrangements for the adoption of a child unless that body is registered as an Adoption Society. It provides for the registration of local and international adoption societies, which shall then be authorized to make arrangements for the adoption of a child.

Further, a foreign applicant must come through an adoption society in the country where he is resident and that application for adoption must be placed a locally registered society. All international adoption applications must be approved by the adoption committee. Currently, the adoption committee has licensed five local adoption societies with mandate to carry out international adoptions and the licenses are renewable annually. The societies are Little

Angels Network, Kenya Christian Homes, Ark Cradle Centre, Kenyan to Kenya Peace Initiative and Child Welfare Society of Kenya The committee has also approved nineteen foreign societies to make arrangements for international adoptions through a local society.

### **Other Players in the Adoption Process**

The judiciary plays an important role in adoption where matters are heard in the judges chambers and under the family division of the high court. The court appoints a guardian ad litem, hears the application, receives assessments reports and issues the final adoption orders. The registrar general issues the adoption certificate, children's department provides the adoption secretariat and provides assessment reports for the adoption committee and the court on all adoption applications. The department of immigration services issues a travel document to the child after an adoption order has been granted in liaison with the children's department. Missions of foreign countries play a crucial role in providing background checks and certifying applicants and societies as fit and capable of caring for an adopted child. Also issue travel documents particularly visas to the adopted children.

Other key players include charitable children institutions which host many children who are later given up for adoption. Most act as holding centres and care facilities before a child is placed with an adopting family; and the Law Society of Kenya plays a crucial role since its members, the bar, are the ones who make adoption applications to the courts on behalf of the applicants. The lawyers ensure that the due process is followed guaranteeing that the legal paper work and documentation is scrupulous.



## CHAPTER THREE

### **Adoption: Philosophy, Process and role in Child Protection**

The chapter is an overview of international adoption as a strategy for availing care for vulnerable children in need of protection. It highlights discusses what adoption is, its philosophy, elements, process, as a migration, its implications on culture and child protection generally.

### **Definition of Adoption**

Adoption involves becoming a parent through a legal and social process rather than a biological process; it is a permanent change for the child in family affiliation.<sup>1</sup> It provides a permanent substitute care for a child whose natural parents are unable, unwilling to care for and when these parents have been freed of any ties to the child.<sup>2</sup> In earlier days, adoption existed to meet interests and needs of adults, but today the institution is supported because it meets the needs of children. The orientation has changed from providing children for childless parents to concern with providing parents for parent less children. Adoption served the interest of adults who could not bear children the natural way or those who could not sire male children to inherit their thrones or massive wealth. Adoption has psychological and legal effects. The modern trend in adoption is primarily philanthropic and is designed to at least meet the needs of children in need of care and protection. With overpopulation, displacement through conflict, scourge of HIV/AIDS, debilitating poverty in the developing countries, more and more children lack access to basic needs and adoption is being used as a social welfare intervention to offer protection to the vulnerable children. It facilitates placement of children, whose biological parents cannot or will not raise, in stable

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<sup>1</sup> Kadushin, Alfred. *Adopting Older Children*. New York, Columbia University Press, 1970 p.1

<sup>2</sup> Ibid

homes with adoptive parents who are willing to assume all parental rights and responsibilities.<sup>3</sup>

A distinction is made between domestic and international adoption. Domestic adoption is where a child is adopted within its country of birth and by a citizen of that particular country. The child does not cross any international border and does not acquire a new nationality. On the other hand international adoption involves a child being adopted by a foreign national, there is change of nationality and crossing of an international border. International adoption thus implies interaction both at the legal and diplomatic levels between two jurisdictions. The legal interaction between two jurisdictions emanates from the fact that the receiving state must be willing to recognise the (adoption) order and any other edicts issued by the courts in the sending state. The diplomatic interaction is experienced in the relationship between the embassies of the receiving and sending states. This is largely during the process where documents have to be authenticated, background checks on adoptees and eventual issuance of traveling documents and entry passes by respective embassies.

Although adoption establishes kinship in law, it does not appear to be regarded as the equivalent of kinship based on a biological tie.<sup>4</sup> A kinship system defines who is related to whom and has traditionally been based on blood or biological relationships among individuals. According to Bartholet this has driven many away from adoption as an alternative parenting experience and defined as inferior to biologically reproducing and parenting a child.<sup>5</sup> Another distinction made in adoption among scholars is the adoption because of infertility and adoption for social or altruistic reasons. Couples that suffer infertility and thus unable to conceive opt for adoption and in most cases prefer infants. Those adopting for altruistic considerations do it to help less fortunate children. A majority of them are well to do and have their own biological children and feel

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<sup>3</sup> Hollinger, Heifetz, Joan Adoption Law, 'The Future of Children', Vol. 3, No. 1, Adoption. (Spring, 1993), pp.43-61

<sup>4</sup> Miall, Charlene E, The Social Construction of Adoption: Clinical and Community Perspective, 'Family Relations', Vol. 45, No. 3 (July 1996), pp.309-317

<sup>5</sup> Ibid

that by adopting, they are giving back to society. Altruist adoption is a form of social responsibility and the age of the child is not a great consideration as the motivation is to provide basic needs and a better quality life.

Varma argues that this distinction has led to adoptive families particularly infertile couples seen as a minority group and causing community attitudes whose prejudices die hard.<sup>6</sup> Miall adds that negative beliefs about adoption in the community has created stigmatization based on the absence of blood tie, that biological tie is important for bonding and love, bonding and love in adoption are second best; because of their unknown genetic past, adopted children are second rate; and that adoptive parents are not real parents.<sup>7</sup> The stigmatisation arises from the fact that the process of having children has been identified as an enduring function of the family and the traditional method through which a child enters a family is through the mating of its biological parents. Adoption is thus seen as a non-traditional way in which children are added to families hence the stigma. In Kenya, most children offered for adoption are largely those who have been abandoned and parents cannot be traced or those whose parents gave up for adoption either due to inability to provide adequate care and or children of unwanted pregnancies. Societal attitudes brand these children as illegitimate hence the stigma that will follow them to adoption.

### Types of Adoption

Hollinger has advanced contexts in which adoption takes place and emphasis is put on intra-family adoptions and those by unrelated adults. Intra-family adoptions legally recognize an existing *de facto* custodial family, thereby allowing the children to preserve ties to some members of their families; is the most unregulated and generates some of the most bitterly contested proceedings.<sup>8</sup> With the scourge of HIV/AIDS, this type of adoption is common in Kenya many children have been orphaned and left in the care of their uncles,

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<sup>6</sup> Varma, V. P. *Stresses in Children*, University of London Press, 1973 pp. 72-73.

<sup>7</sup> Miall, Charlene E. The Social Construction of Adoption: Clinical and Community Perspectives, 'Family Relations', Vol. 45, No. 3. July 1996. pp.309-317.

<sup>8</sup> Hollinger, Heifetz, Joan Adoption Law, 'The Future of Children', Vol. 3, No. 1, Adoption. (Spring, 1993), pp.43-61

aunties, grandparents and all manner of blood relatives. This relies on extended family ties, kinship and linkages and is unregulated since the guardians do not formalise the process in court and the child basically retains the family name. The lack of regulation in some instances create disputes particularly if the child's parents left behind considerable amount of property. Due to lack of legal regulation, adopted children risk being disinherited by their guardians.

The other type is adoption of infants and older children by unrelated adults. Many of these children are either in foster homes or institutions placed by the state before they are legally available for adoption.<sup>9</sup> International adoption is that type where individuals or couples unrelated to a child born in another country become the legal and permanent parents through a judicial process. In France this kind of adoption is referred to as "full adoption" where all legal bonds with birth family are cut and does not keep the birth family name.<sup>10</sup>

### **Principles and philosophy of adoption**

The concern for child protection as an essential part of broader spectrum of human rights protection has become a global issue. Through international treaties such as The UN Convention on the Rights of the Child (1989), The Hague Convention on Intercountry Adoption (1993), states have developed transnational legal mechanisms to ensure general recognition of children's fundamental rights, including growing up in a family.<sup>11</sup> Children rights are viewed as distinct category of rights and their protection and promotion is recognised as crucial in the broader protection of human rights. This categorisation derives from the vulnerability and 'helplessness' of children, that is, children are not able to make their own decisions and as such need to be protected by adults through social networks or legislation. The issue of children is seen as one of universal concern, and codification of children rights seen to recognise the moral claims of children on society. Human rights is based on simply on the inherent (moral)

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<sup>9</sup> Ibid.

<sup>10</sup> Mandell, Reid Betty, Adoption, 'New Politics' Vol. XI No 2

<sup>11</sup> Tomescu, Irina, Causes and Consequences of Child Abandonment – The Case of Romania, Columbus, Ohio

personality of humans and this is included in the preamble to the Convention on the Rights of the Child which speaks of "inherent dignity and of the equal and inalienable rights of all members of human family".<sup>12</sup> Key in the convention is the provision that attempts should be made to ensure that a child grows up in a family setting, preferably its natural family. Adoption, particularly international should be a last resort when a child cannot be cared for by its natural birth parents and is seen to create (an alternative) degree of stability, security and psychological belonging unmatched by any other form of substitute care<sup>13</sup>. In Kenya, the most common substitute care for children is institutionalisation where children are placed in children homes and orphanages.

Adoption as an institution is seen to serve the best interests of the child, a philosophy that forms the core of the UN Convention on the Rights of the Child. Article 3, Paragraph 1 of the Convention states that 'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration'.<sup>14</sup> The CRC has fundamental articles which identify certain principles that are paramount, impossible to circumvent, and which govern the application of the entire Convention. Articles 1 to 5 of the CRC are umbrella articles which cover all other provisions.<sup>15</sup> Cutting across the articles are the concepts of well being of the child and the best interests of the child. The principle implies that in all interventions and circumstances, the interest of the child is to precede any other interest and the ultimate goal is to ensure child's ultimate well being in every intervention. Zermatten posits that as defined, best interest of the child has two traditional roles, one to control and one that finds solutions.<sup>16</sup> The control criterion is used to ensure that the exercise of rights of the child and obligations towards children is correctly carried out; while

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<sup>12</sup> Pupavac, Vanessa, *Misanthropy Without Borders: The International Children's Rights Regime*, 'Disasters', 2001, 25(2): 95 - 112

<sup>13</sup> Schulman, Irving; Behrman Richard E, *Adoption: Overview and Major Recommendations*, 'The Future of Children', Vol. 3, No. 1, Adoption. (Spring, 1993), pp. 4-16.

<sup>14</sup> United Nations Convention on the Rights of the Child, Article 3, 1989

<sup>15</sup> Zermatten, Jean, *The Best Interests of the Child: From the Literal Analysis to the Philosophical Scope*, Working Report 3 – 2003.

<sup>16</sup> Ibid

the solution criterion is where concept of the right of the child itself must intervene to help the people that need to make the right decisions for children. The best interest of the child aims at ensuring the wellbeing of the child on the physical, psychological and social level. It establishes an obligation for public or private authorities to examine whether this criterion is fulfilled at the time when a decision must be taken on behalf of the child and represents a guarantee that its long term interests will be taken into account, and is used as a measuring unit where there are several competing interests.<sup>17</sup>

There is however no consensus on the application of the best interest principle particularly in adoption. The scope of the principle in terms of what to be given weight and how much weight have received varied interpretations and implementations in child intervention. The terms paramount and primary have been deployed with paramount consideration seen as outranking and trumping all other considerations while primary is a consideration is a leading consideration, one that ranks first among several.<sup>18</sup> The best interest principle has been criticised for being difficult to implement and too demanding on agencies charged with intervening on behalf of children. Best interest is a value laden and subjective principle as it is based on some perceived standard determined by human beings. Questions of who determines the best interest and how this is done and who measures the outcome have been raised. There are widespread cultural, political and legal considerations in different countries making it almost impossible for the principle to be universally applied. Alston posits that there is extensive disagreement about what is best for children, or for a child, which are set in the context of broader cultural disagreements about morality in general and that what is best for a child is different in different cultures.<sup>19</sup> It is also accused of lacking precise definition in relation to space and time and based on personal subjectivity of parents/guardians, child and the judge or administrative authority or agency making a decision.

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<sup>17</sup> Ibid.

<sup>18</sup> Children's Rights, Stanford Encyclopedia of Philosophy pp. 1-36

<sup>19</sup> Alston, P., Parker, S., and Seymour, J. (eds.) **Children, Rights and the Law**, Oxford: Oxford University Press quoted in Children's Rights, Stanford Encyclopedia of Philosophy pp. 1-36

Despite the criticism, the principle is a useful legal concept that makes the child a subject of rights, places obligation on states, individuals and agencies that has contributed to improvement in interventions on behalf of the child. It is evolutionary and is subject to improvement over time and to be used to interpret and evaluate interventions all the time. Zermatten recommends that to make it more useful, it should be specified or supplemented by rules for application, chosen according to the various fields where best interests of the child must apply.<sup>20</sup> The United Nations Commissioner for Refugees (UNHCR) has developed a Best Interest Determination procedure code which sets out clear criteria for determining interventions for displaced children and unaccompanied minors in a conflict or emergency situation.

### **Elements of Adoption**

Adoptive relationships have elements based on legal requirements for adoption or its social and psychological effects. Legal elements is when the child acquires a takes the identity of the parents through a judicial process which when complete is irrevocable. The socio-psychological effects on the other hand include emotional adjustment to new social and physical environments. The child joins a new community with different worldviews, cultures, levels of advancement and value systems. It displaces completely the child's prior ties to the biological family and replicates in the adoptive family all aspects of an original parent child relationship. This should eventually lead to lasting personal and psychological bond between the child and the adoptive parents.

Another element is that of consents or appropriate waivers before an adoption can proceed. An adoption petition can only be granted if natural parents have executed consents to release the child voluntarily. This element presupposes that the natural parents or legal guardian has been counselled on the effects and permanency of adoption and are deemed fit to execute the consents. Another element is whether the placement with suitable adoptive

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<sup>20</sup> Zermatten, Jean, *The Best Interests of the Child: From the Literal Analysis to the Philosophical Scope*, Working Report 3 – 2003

parents serves the best interests of the child. The adoptive parents must be suitable and able to offer care to the child, though there is disagreement on how this suitability can be determined or achieved. The suitability criteria is said to exclude many prospective adoptive parents denying many children opportunities to access good care. Adoption is viewed as a gratuitous transfer rather than a commercial or financial transaction.<sup>21</sup> Adoptions are not supposed to generate improper financial gain, solicitation of children is deplored and no money or other valuable consideration is to be paid in exchange for a child. The confidentiality and anonymity in adoption are also key elements that must be observed. The identity of adopters and adoptee and the proceedings of the judicial process should be confidential and that is why adoption proceedings in a court are heard in the chambers.

Another key but controversial element is the permanent nature of adoptive relationship. An adoption decree or order creates a permanent relationship between child and adopting parents and is irrevocable unless there is proven fraud or other fundamental irregularity in the process. There is controversy in the permanence as child development experts argue that there should be procedures for unwinding some adoptive relationships, not to relieve adoptive parents of an unanticipated burden but to find a more appropriate placement for the child.<sup>22</sup> The questions the opponents of permanence pose is whether a child should be live in an environment where its interests are not met, or should a the adopters forever live with a child whom no longer meets their expectation just because adoption is permanent? It is argued there should be a mechanism to dissolve adoption relationships that do not meet the interests of both parties particularly those of the child.

## **The Adoption Process**

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<sup>21</sup> Hollinger, Heifetz, Joan Adoption Law. 'The Future of Children', Vol. 3, No. 1, Adoption. (Spring, 1993), pp.43-61

<sup>22</sup> Ibid



The process of adoption is regulated by a myriad of state, federal and international laws. This complex regulatory system has produced great variation on even most basic issues in adoption such as obtaining parental consent and ensuring confidentiality<sup>23</sup>. There is little or no consensus on how to balance the psychological and social needs of the natural parents, adoptive parents and adoptees and the legal requirements of the receiving and sending states. However, there is a general agreement that the psychosocial and legal prerequisites must be met to make the process legitimate and ensure the best interests of the child are protected and or promoted.

Child adoption in Kenya is provided for in The Children Act. No. 8 of 2001 under Part XII. The Children Adoption Regulations, 2005 which were gazetted on 20<sup>th</sup> May 2005 provide the guidelines on the adoption process. Procedures under this Act and Children's Adoption Regulations and court rules are mandatory for any person wishing to adopt in Kenya. International adoptions in Kenya can be conducted in respect of a child upon the application of individuals who are not in Kenya. International adoptions are processed through approved foreign adoption agency in conjunction with an approved Kenyan adoption society to make international adoption arrangements. For instance, for a society to be recognised as conducting inter-country adoption between Kenya and the United Kingdom, it must be duly registered and recognised under UK laws. It must also be approved to conduct inter-country adoption in Kenya. The registration of adoption societies and approvals of international agencies is done by the National Adoption Committee established under the Children's Act.

The first step in the process is for the applicant to consider the age and gender of child to adopt, country to adopt from and to establish if the receiving country will accept children adopted from the country chosen. The applicant will then submit an application to a registered Kenyan adoption society through an adoption agency in the receiving country. The application will include the identification documents, photos of applicant, clearances from the government and a home study report indicating the suitability of the applicant. The home

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<sup>23</sup> Ibid

study report is usually done by the local authority or social services department of the receiving country, in the case of the United Kingdom is provided by the Department of Education and Skills. In some cases the local authorities or social services department may delegate the home study responsibility to a licensed adoption society. The home study covers assesses the suitability of applicants in terms of financial ability, family stability, psychological and emotional preparedness of the applicant. It is a psychosocial assessment and home situation and preparing the applicant for international adoption. Once submitted to a Kenyan adoption society, the application will be assessed and if the society is satisfied it passes it on to the National Adoption Committee for approval. If approved by the Committee, the applicant can then start the process proper by traveling to Kenya for a face to face interview and assessment with the Society through which it applied.

After the interview and assessment by the Society, a child matching the applicant's preference will be identified and the introduced to each other. However, before the introduction is done, the child must have been declared free for adoption by the society. If the applicant accepts the choice of child, then the child will be placed in her care to begin the bonding process before starting the legal process. The psychosocial process has been criticized for being too subjective as the assessments in themselves are no adequate to guarantee the suitability of the applicant. The Society in Kenya relies on a home study report done in the applicant's country, by officers in an agency in the same country and it is difficult to ensure integrity of the process. On the question of matching applicant with the child, what are the considerations, those specifications given by applicant or the protection needs of the child? Granted, some applicants do not mind the choice of child, actually some prefer special needs children like those with disabilities, medical conditions but a majority want 'normal' children.

On the choice of child, experts have asked whether a specific child is introduced to the applicant and what happens when the applicant does not like child, do you introduce another child? Further, does the Society bring out the children one by one or is the applicant shown children in a room just like it is

done with goods on display in supermarket shelf? This is a balance difficult to achieve but everything done must take into consideration of the dignity of the child as a human being. The practice with the Societies is to introduce one child that is a close match to applicant's preference and should the child be rejected, the case is closed and applicant asked to reapply after some period of time.

The legal process is less controversial as the procedures are spelt in the Children's Act 2001. Before filing the matter before a court, the applicant must have lived in Kenya with the child for three consecutive months. This bonding phase is mandatory and has raised a lot of controversy. Most applicants argue that they cannot leave their countries and come to stay in Kenya for three months. First, it is expensive as one has to meet costs of hotel and other living expenses or a rent a house for the period. Secondly, whether in formal employment or self employment/business, staying away for three months can cause financial difficulties occasioned by job loss as no employer can give such long time off; or collapse of businesses. Thirdly, the court process in Kenya takes a long time and it is hard to plan on the timelines within which the process will be complete. Child rights activists however say the bonding time of three months is actually shorter arguing that it should actually be extended as the normal waiting period before a natural delivery is nine months!

If an applicant has completed the three months bonding period, an advocate of the High Court can file the matter. This is preceded by securing consent from parents, guardians or any person having parental responsibility over the child to be adopted. A child who has attained the age of fourteen years must also execute a consent stating willingness to be adopted. Consents can be dispensed with in the case of parents or guardians who have abandoned or neglected their children, or cannot be found, or spouses permanently separated. The applicant must also provide consent from a court in their country or a competent government authority stating that an adoption order from Kenya will be recognised. Once case is filed, the court will peruse the documents and appoint a *Guardian ad Litem*, who is a neutral person, with enough knowledge of child protection and whose responsibility is to monitor the progress of the child

while in the care of the applicant. The *guardian ad litem* is expected to provide the court with a report detailing an objective assessment of the condition of the child before an order can be made. The matter will be heard in the chambers and before an order is issued, an assessment report must be provided by an officer of the government, usually a Children's Officer.

If satisfied, the court issues a final adoption orders which is then taken to the Registrar General (Marriages and Adoptions) for entry into the Adopted Children's Register and issuance of an Adoption Certificate. An adoption order can only be issued by the High Court of Kenya and not a lower court. It has the effect of transferring all rights, duties and responsibilities over a child to the adopter as if the child was born to the adopter. It extinguishes the rights, duties, responsibilities that a parent, guardian or anyone having parental responsibility before the order was made. Once issued with the adoption certificate, the adoptive parent can obtain travel documents for the child from the embassy of the receiving country.

### **International Adoption and Child Protection**

There is great controversy about the benefits and dangers of international adoption. Those against adoption view it as the ultimate kind of exploitation, the taking by the rich and powerful of the children born to the poor and powerless.<sup>24</sup> It tends to involve the adoption by the privileged classes in the industrialized countries of the children of the least privileged groups in the poorest nations and the separation of children not only from their birth parents, but from their racial, cultural, and national communities as well.<sup>25</sup> Proponents of international adoption see it as a positive thing, where parents reach out to children in need and the cultural and racial differences viewed as a chance for the parents and children appreciate one another's differences and experience their common humanity.<sup>26</sup> Critics of international adoption raise concerns on the responsibility of the

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<sup>24</sup> Bartholet, E. **Family Bonds: Adoption and the Politics of Parenting**. New York, Houghton Mifflin, 1993

<sup>25</sup> Ibid

<sup>26</sup> Ibid

receiving state in honouring rights of a child from another country, what rights does the sending country relinquish on behalf of the child and in terms of culture does the child have a right to their culture of origin. The CRC in Articles 7 and 8 provide for one's rights to creed, religion, language and culture<sup>27</sup>. Article 21 of the CRC states that due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background<sup>28</sup>.

The provisions of Article 21 are easily met in the local adoption but placement in a culturally foreign environment is argued not to be in the best interest of the child. According to Rios- Kohn opponents of international adoption not only question the legitimacy of the adoption process but also raise the ethical dilemma of depriving children their national heritage and culture<sup>29</sup>. Hermann and Kasper insist that the child's social adjustment and identity must be considered in the context of the adjustment in a potentially racist environment and question if the good adjustment of these children is accomplished at the cost of their ethnic identity<sup>30</sup>. Despite the criticisms on the cultural and identity concerns, proponents of international adoption like Bartholet argue that its benefits in child protection outweigh the negative effects. The children adopted access basic services that help their development and enhance access to rights protection. It is a solution to homelessness and abandonment in the sending countries. With levels of poverty so high in some of the sending countries, "it is clear that the last thing these countries need is more children to care for"<sup>31</sup>. Lovelock argues that the problem is not international adoption but the weaknesses in existing legislative regulations. He states that the Hague Convention provides the fundamental framework, (but) ultimately it is up to the political will of the

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<sup>27</sup> Convention on the Rights of the Child 1989, Articles 7 & 8

<sup>28</sup> Ibid Article 21

<sup>29</sup> Rios –Kohn, R *Intercountry Adoption: An International Perspective on the Practice and Standards.*

*'Adoption Quarterly'* 1 (4), 3-32.

<sup>30</sup> Hermann, Kenneth J and Kasper , Barbara, (1992) *International Adoption: The Exploitation of Women and Children.* 'Affilia', Vol. 7, No. 1 pp.45-58.

<sup>31</sup> Bartholet 1993

Contracting States to ensure that definitions and related mechanisms are put in place to protect the welfare of the children migrating for adoption<sup>32</sup>.

### **International Adoption and Cultural Identity**

International adoption or transracial adoptions generate serious questions of how cultural boundaries are determined and how cultural belonging and identity should be understood, as some members of historically advantaged groups have argued that the adoption of their children is a form of cultural exploitation.<sup>33</sup> Questions are asked which culture the child takes after adoption, how much of its culture of origin should it retain and how much of the new should it take up. Identity formation by these children is seen as a struggle as they are seen to have a weaker claim to the nationality of their new countries; some see themselves or are seen by others to be less authentic nationals or citizens<sup>34</sup>. There is a growing sense of nationalism and identity in the world leading to more exclusionary ideas of citizenship and increased awareness and distinction between locals, nationals, citizens, foreigners, immigrants, outsiders and strangers with emphasis on opportunities, economic entitlements, cultural recognition and political representation<sup>35</sup>. Children adopted in mixed race scenarios are certainly bound to feel this divide.

It has been further argued that international adoptions complicate in the case of very young children and may render incoherent the notion of cultural belonging, especially the idea of a culture of origin that differs from the immediate cultural context in which a child is raised.<sup>36</sup> Transracially adopted children face challenges in coping with being different and have confusion over ethnic identity.

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<sup>32</sup> Lovelock 2000

<sup>33</sup> Hearst, Alice Review: Multiculturalism, Rights, and the Adoption Conundrum, 'Law & Society Review', Vol. 36, NO. 2, Special Issue on Non-biological Parenting. (2002), pp.489-506

<sup>34</sup> Nyamnjoh, Francis B., Globalisation, Boundaries and Livelihoods: Perspectives on Africa, Identity, 'Culture and Politics', Vol. 5, Nos. 1 & 2, 2004, PP. 37-59

<sup>35</sup> Ibid

<sup>36</sup> Hearst, Alice Review: Multiculturalism, Rights, and the Adoption Conundrum, Law & Society Review, Vol. 36, NO. 2, Special Issue on Non biological Parenting. (2002), pp.489-506

The physical differences, social environments, attitudes, languages make fitting in a new environment a challenge particularly for children adopted at an older age. It has been questioned if placing a child in a culturally different environment is in its best interest. Opponents of international adoption argue that a coloured child for instance, could go from being a typical citizen of its country of origin to being a visible minority in the new environment and possibly into a culture of racism possibly leading to abuse, discrimination, cultural and identity crisis. The identity problem is more difficult for older children who have already formed an identity and have to change to conform to the new environment. The self identity is the basis of a stable personality and its acquisition is no problem in a stable community where everyone is of the same colour, race, religion and traditional culture<sup>37</sup> but is much more difficult to develop and maintain in an environment where one has to deal with being different. The effect on the child could lead to low self esteem, stigmatisation, integration problems, truancy and deviant behavior amongst some children. Ressler et al observed that by removing children from their native lands and raising them in families and communities where they will always be different may condemn them to psychological status of refugees, because they come with histories of deprivation, loss and psychological vulnerability that results from drastic cultural change.<sup>38</sup>

However, pro - international adoption scholars argue that it is the role of the modern state to create conditions for meaningful intercultural dialogue because there is an intrinsic value in cultural diversity for human good.<sup>39</sup> Bartholet argues that there is no evidence that multicultural identity is problematic to children.<sup>40</sup> National Association of Black Social Workers in the United States however termed transracial adoption as a form of "race and cultural genocide"<sup>41</sup>.

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<sup>37</sup> Lobo, Edwin de H, **Children of Immigrants to Britain: Their health & Social Problems**, Hodder & Stoughton, London, 1978.

<sup>38</sup> Ressler, E. M, Boothby, N and Steinbock, D. J. **Unaccompanied Children: Care and Protection in Wars, Natural Disasters and Refugee Movements**. New York, Oxford University Press, 1998. p.181

<sup>39</sup> Hearst, Alice Review: Multiculturalism, Rights, and the Adoption Conundrum, *Law & Society Review*, Vol. 36, NO. 2, Special Issue on Non biological Parenting. (2002), pp.489-506

<sup>40</sup> Bartholet Elizabeth, *International Adoption: Current Status and Future Prospects*, *The Future of Children*, Adoption Vol. 3, No. 1 Spring 1993. 89-103

<sup>41</sup> Hearst, Alice Review: Multiculturalism, Rights, and the Adoption Conundrum, *Law & Society Review*, Vol. 36, NO. 2, Special Issue on Non biological Parenting. (2002), pp.489-506

International adoption would thus be seen as a danger to preservation and protection of individual cultures. It has further been argued that globalization has particularly rendered cultural and ethnic differences as unimportant and that international adoption creates an "ethnospace" that lessens differences<sup>42</sup>. It is seen as breaking down boundaries and accelerating flows and fluidity across cultural, social, physical and economic boundaries<sup>43</sup>. This however may not be the case because despite claims of globalisation, and creation of a world community, the developed countries continue to tighten immigration laws making entry into their countries almost impossible. The European Union is virtually a blockade and acquiring a visa to the United States and entry is very difficult. Xenophobia is on the rise as witnessed in the attacks on foreigners in South Africa and perception Tanzanians have of Kenyans. Refugees and immigrants face grave predicaments in a world where countries primary concern is the protection of their borders rather than protection of asylum seekers and refugees. There is an obsession with boundaries everywhere and the only thing that has changed is the shortening of space and time in terms of physical communication and information flow due to internet connectivity and modern fast means of travel. Globalisation has thus been seen to bring power to a minority, where global capitalism caters for the needs of investors and owners of capital and affluent consumers which is a substantial proportion in the developed West but a distinct minority in the underdeveloped South<sup>44</sup>.

Increasingly, international human rights documents call upon signatories to provide indigenous and national minority groups with protection from the assimilative pressures of dominant cultural groups<sup>45</sup>. The minority here should be

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<sup>42</sup> Working Paper Series, *Child Interrupted: International Adoption in the Context of Canadian Policy on Immigration, Multiculturalism, Citizenship, and Child Rights* by Zofia Sonia Worotyneć, CERIS Working Paper No. 46, Toronto, April 2006.....p.14

<sup>43</sup> Nyamnjoh, Francis B., *Globalisation, Boundaries and Livelihoods: Perspectives on Africa, Identity, Culture and Politics*, Vol. 5, Nos. 1 & 2, 2004, PP. 37-59

<sup>44</sup> McChesney, R. W., 1998, *The Political Economy of Global Media*, Media Development, Vol. XLV (4):3-8

<sup>45</sup> Hearst, Alice *Review: Multiculturalism, Rights, and the Adoption Conundrum*, Law & Society Review, Vol. 36, NO. 2, Special Issue on Non biological Parenting. (2002), pp.489-506



seen to also include children adopted across races. The United Nations Declaration on the Rights of Indigenous Peoples declares in Article 6 that indigenous peoples have the collective right to full guarantees against genocide or any other act of violence, including removal of indigenous children from their families and communities under any pretext<sup>46</sup>. In the Convention on the Rights of the Child, there is no specific article but it contains open ended language scattered through its provisions guaranteeing children the right to personal, familial, cultural, communal and national identities<sup>47</sup>. The Universal Declaration of Human Rights has provisions in Articles 15 for right to nationality and that no one should be forced to change his nationality<sup>48</sup>.

### **International Adoption and Migration**

Cultural and political considerations play an important role in whether a child is allowed to leave a particular country or to enter another for adoption. These considerations are reflected in legal criteria used by governments to control this emigration and immigration processes, which vary greatly between many countries.<sup>49</sup> International adoption in its form is an unusual migration process which Petersen refers to as a type of forced migration, since orphans have no control whether or where they will be moved to.<sup>50</sup> Weinstein and Pillai denoted forced migration as when a person is moved against their will or when the move is initiated because of external factors like natural disaster or war<sup>51</sup>. International adoption is viewed as a form of forced migration because the decision to move is primarily made by the movers (adoptive parents) and not the child. It is a form of international migration since it involves change of residence over national boundaries. Ravenstein in his *Laws of Migration* work wrote that migration is

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<sup>46</sup> United Nations Declaration on the Rights of Indigenous Peoples (2006), Article 6

<sup>47</sup> Hearst, Alice Review: Multiculturalism, Rights, and the Adoption Conundrum, *Law & Society Review*, Vol. 36, No. 2, Special Issue on Non biological Parenting. (2002), pp.489-506

<sup>48</sup> Universal Declaration of Human Rights (1948) Article 15

<sup>49</sup> Richard H. Weil, *International Adoptions: The Quiet Migration*, *International Migration review*, Vol. 18, No. 2. (Summer, 1984), pp.276-293

<sup>50</sup> *Ibid.*

<sup>51</sup> Weinstein Jay., and Pillai, Vijayan (2001). *Demography: The Science of population*. Boston: Allyn and Bacon. pp

governed by a "push-pull" process, that is, unfavourable conditions in one place push people out, and favourable conditions in an external location pull them out<sup>52</sup>. In international adoption, there is a pull of prospective adopters who want to take local children home and mixed with the push efforts of a government anxious to remove some of its institutionalized minors.<sup>53</sup> The parallel between international adoption and foreign migration is that the individuals cross international borders but which are not necessarily dissimilar in cultures as some countries that share borders have similar ethnic groups living across both sides.

A distinction is made between internal and international where the former refers to change of residence within national boundaries while the latter is where a migrant crosses an international border. International migration like in adoption is impeded by structural barriers, as it involves administrative procedures, greater expense, and more difficulties associated with obtaining employment, accessing state services, learning a new language. Most countries have passed legislations in response to increasing public interest in international migration and adoption. A country like the United States has strict immigration policies which apply to normal immigrants as well as to internationally adopted children. In Britain, there is no legislation to expedite international adoption and an adoptee requires the approval of the Home Secretary<sup>54</sup>, which basically treats it as an immigration process though subject to a court's approval. In this immigration process in the form of adoption, there has to be a supply of children properly identified as adoptable, clear understanding between officials what the process entails and means, and laws which allow it to operate. This forced migration is compared to that of refugees fleeing to seek safety and security and economic migrants seeking a livelihood in foreign countries, the only difference here is the circumstances and conditions of the movement. The 1951 Convention Relating to the Status of Refugees and the 1967 Protocol govern the protection of those

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<sup>52</sup> Ravenstein, E. G. (1889). The Laws of Migration. *Journal of the Royal Statistical Society* 52:245-301.

<sup>53</sup> Richard H. Weil, *International Adoptions: The Quiet Migration*, *International Migration review*, Vol. 18, No. 2. (Summer, 1984), pp.276-293

<sup>54</sup> *Ibid*

who migrate to seek asylum<sup>55</sup>. It provides condition for qualification to be a refugee where once can no longer obtain adequate protection from the country of origin due to either persecution or collapse of the state due to conflict. The parallel with international adoption could be that the state can no longer or is not able to provide adequate care and protection to the child being adopted and to the citizen seeking refuge/asylum in a foreign country. The asylum seekers are fleeing to seek protection and security and the child is adopted to be provided with protection and security. In the 1951 Convention, a pre condition for refugee status is the crossing of an international border from one country into another for instance an Ethiopian crossing into Kenya border at Moyale. International adoption also takes place when a child enters a new country.

In the migration process, a distinction is thus made of legal and illegal immigration. Illegal immigration is immigration across national borders in a way that violates the immigration laws of the destination country and illegal immigrant is a foreigner who has either illegally crossed an international political border be it by land, air or water or a foreigner who has entered a country legal but has overstayed his visa. International adoption is however legal as the child in most cases will have the requisite papers before entry and should on entry obtain registration as a citizen of that country within reasonable time. International adoption is permanent in nature while immigration for economic reasons or for asylum is temporary and refugees normally return when it is safe to do so and economic migrants at times are deported or forced to return to countries of origin when their visa conditions expire.

### **Future Prospects**

Despite all the arguments against international adoption, it must be accepted as permanent feature, indeed a major policy issue for child protection in a globalised world. The nations of the world should accept this and move beyond political hostilities and symbolic acts to focus on the needs of children, and accept international adoption as a good solution for at least a portion of the world's

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<sup>55</sup> 1951 Convention Relating to Refugees and 1967 Protocol

homeless children.<sup>56</sup> Countries need to coordinate their laws to expedite the process, restructure their laws and policies so as to facilitate rather than impede adoption.

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<sup>56</sup> Bartholet Elizabeth International Adoption: Current Status and Future Prospects, *The Future of Children Adoption* Vol. 3 No. 1 Spring 1993 pp. 89-103

## CHAPTER FOUR

### **Case Study of Kenya's Implementation of International Adoption Standards**

#### **Introduction**

This study set out to examine the extent of Kenya's implementation of international standards/instruments that regulate international child adoption since 1990. It examined the systems, mechanisms and systems put in place by Kenya to ensure that the international adoption process is done in a manner that promotes the welfare and best interests of the child. The standards are provided in major international instruments that govern child protection which are the 1986 United Nations Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption, Nationally and Internationally; Convention on the Rights of the Child; 1993 Hague Convention on Intercountry Adoption; and African Charter on the Rights of the Child. The provisions of these instruments as relates to international adoption were discussed in chapter two of the project. The development of these international instruments is indicative of the importance and nature of the qualitative problems involved in international adoption and a reflection of the rapidly increasing level of preoccupation about the large scale abuses of the spirit and procedures of intercountry adoption.<sup>1</sup>

#### **Justification for meeting the standards**

The essence of meeting the standards is to ensure that intercountry adoptions are made in the best interest of the child with respect to its fundamental rights and to prevent abduction, the sale of, or traffic in children. It is to provide for the recognition and enforcement within all contracting states of measures directed to protection of children's person and property to establish the necessary cooperation between authorities of contracting states in order to achieve this basic purpose; the overall aim being to improve the protection of children in

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<sup>1</sup> Intercountry Adoption, Innocenti Digest 4', United Nations Children's Fund, International Child Development Centre, Florence Italy, 1998 p. 4

international situations.<sup>2</sup> The convention through the standards establishes a system of cooperation between authorities in countries of origin and receiving countries; provides greater predictability for adopters by setting out clear procedures and prohibiting financial gain; provides a uniform approach; and provides states and other players more experience to draw from and develop best practices.<sup>3</sup>

Shaw posits that adherence to standards in international law derives from the hectic interplay of world affairs and need for some kind of regulatory framework, for some kind of rules network within which the game can be played; states feel this necessity because international law imports an element of stability and predictability into the situation<sup>4</sup>. Implementation of these standards will thus regulate international adoption and bring some predictability and stability. States must also put in place measures to implement provisions of an international agreement they have agreed to be bound to or oblige. This is expressed in the theory of auto-limitation or self limitation which declared that states obliged to comply with international legal rules if they had first agreed to be so obliged<sup>5</sup>. Kenya has ratified the Convention on the Rights of Children and deposited an instrument of accession to the Hague Convention and is bound to implement the provisions of the international instruments.

### **Main Standards Provided by International Law**

The standards provided for in international law operate on the principle of best interest and rights of the child. The child's best interests are to be primary consideration in all actions concerning the child particularly non-discrimination of any kind, irrespective of the child's parentage, race, colour, sex, disability, status at birth as set out in Article 2(1) of the CRC. Further, the principle of non-

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<sup>2</sup> Lowe, Nigel, International Developments, The 1996 Hague Convention on the protection of children – a fresh appraisal, 'Child and Family Law Quarterly', Issue 2, June (2002) CFLQ 191, Jordan Publishing Limited 2002

<sup>3</sup> Duncan, William, Introduction to Hague Conference and Its Children's Conventions, in a paper presented to Members of the National Adoption Committee, January 2006, Nairobi.

<sup>4</sup> Shaw, Malcolm, N., **International Law**, Fourth Edition, Cambridge University Press, 1997. p.6

<sup>5</sup> G. Jellink, **Allegemeine Rechtslehre**. 1905 in Shaw, Malcolm, N., **International Law**, Fourth Edition, Cambridge University Press, 1997. pp.6-7

discrimination is relevant when comparing the safeguards applied in national and international adoption; when considering the question of which children may be adopted; and when considering the effect of adoption on the status of the adopted child vis a vis other children<sup>6</sup>. The Hague Convention sets out minimum standards to be observed within the intercountry adoption process as described in Chapters II – IV.

### **Requirements for Adoption and Establishment of Competent Authorities**

Article 21 (a) of the CRC requires state parties to ensure that adoption is authorized only by competent authorities who determine, in accordance with applicable law and procedures and with all pertinent information that adoption is permissible in view of the child's status concerning parents, relatives or legal guardians and necessary consents have been obtained<sup>7</sup>. Thus, adoption can only be processed or conducted by bodies authorised and approved by the state. Each contracting state should provide a description of the manner in which the various responsibilities and tasks under the convention are divided between central authorities, public authorities and accredited bodies, so that the entities responsible to act under particular articles of the convention are clearly identified, as well as the mechanisms by which they interact with one another<sup>8</sup>.

The Hague Convention in chapter III article 6 requires a contracting state to designate what it calls a central authority to discharge the duties which are imposed by the convention. Article 7 states that the central authorities shall cooperate with each to protect children and achieve objectives of the convention. Articles 8 to 13 provide that the central authorities shall approve public and accredited bodies which shall conduct international adoption. The central authorities thus have the role of developing laws, policies and procedures and general regulation of international adoption. It is charged with receiving,

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<sup>6</sup> Duncan, William, Introduction to Hague Conference and Its Children's Conventions, in a paper presented to Members of the National Adoption Committee, January 2006, Nairobi.

<sup>7</sup> Convention on Rights of the Child, Article 21 (a).

<sup>8</sup> Duncan, William, Introduction to Hague Conference and Its Children's Conventions, in a paper presented to Members of the National Adoption Committee, January 2006, Nairobi.

assessing, checking and processing applications, identifying children suitable for adoption, interface with the receiving countries, authorise adoption to proceed, put in place procedures to enable the child to leave the country and to receive post adoption reports<sup>9</sup>. It also accredits, controls and reviews agencies/bodies operating in the state of origin. Principally, the central authority should have strong links with other government departments or agencies, have legislative and administrative powers and be composed of personnel with relevant qualifications, experience and ethical standards.

Other key roles of the central authorities in state of origin and receiving state are set out in articles 20 and 21. Article 20 provides that the central authorities shall keep each other informed about the adoption process as well as about the progress of the placement if a probationary period is required. Further, article 21 provides that central authority in receiving state can withdraw the child from the adoptive parents in its best interest and arrange temporary care; arrange without new placement or long term alternative care and central authority in state of origin must be consulted and duly informed. As a last resort, it can arrange for the return of the child, if the interests so require.

### **Subsidiarity**

The preamble of the Hague Convention provides that appropriate measures should be made to enable the child to remain in the care of his or her family of origin; Article 4b states that international adoption should be undertaken only after competent authorities of the state of origin have determined, after possibilities for placement of the child within the state of origin have been given due consideration, that an intercountry adoption is in the child's best interests<sup>10</sup>.

Article 21b of the CRC recognises that intercountry adoption may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's

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<sup>9</sup> Ibid

<sup>10</sup> Hague Convention on Intercountry Adoption, Preamble and Article 4b.



country of origin<sup>11</sup>. Subsidiarity standard requires that international adoption be a last resort child care alternative when no substitute family or other suitable caring environment is not available in the country of origin. A child should be raised by the birth family or extended family where possible; if not possible; other forms of permanent care in the country of origin should be considered, including in particular national adoption<sup>12</sup>. This subsidiarity principle corresponds to the right of the child deprived of his or her family environment to special protection and assistance provided by the state (where the child has been living) as stated in article 20.1 of the CRC<sup>13</sup>. However, the search for national solutions should not result in undue delay in providing permanent care for the child.

### **Cooperation**

In discharging international adoption, cooperation among all players is very crucial to ensure best interests of the child. Internal cooperation between central authority, child care services, courts and advocates should be enhanced through sharing or exchange of information, and meetings. Cooperation should be enhanced externally with the receiving states through regional and international meetings. The laws, regulations, policies, procedures, fees and costs should be clear and accessible to all who use the system. To enhance external cooperation, Article 39 (2) of the Hague convention states that a state party may enter into agreements with one or more other state parties with a view to improving the application of the convention in their mutual relations<sup>14</sup>.

### **Recognition and effects of the adoption**

Chapter V of the Hague convention article 23 provides that an adoption certified a the competent authority of the state of adoption as having been made in accordance with the convention shall be recognised by operation of law in the

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<sup>11</sup> Convention on the Rights of the Child, Article 21b

<sup>12</sup> Duncan, William, Introduction to Hague Conference and Its Children's Conventions, in a paper presented to Members of the National Adoption Committee, January 2006, Nairobi.

<sup>13</sup> Convention on the Rights of the Child, Article 20.1

<sup>14</sup> Hague Convention Article 39 (2)

other contracting state (receiving)<sup>15</sup>. The recognition of an adoption (order) may be refused in a contracting state only if the adoption is manifestly contrary to its public policy, taking into account the best interests of the child<sup>16</sup>. The recognition should include the legal parent-child relationship between the child and adoptive parents; parental responsibility of adoptive parents; and the termination of a pre-existing legal relationship between child and his or her mother and father<sup>17</sup>.

## **Implementation of the International Standards in Kenya**

### **Central Authority**

Article 6 of the Hague Convention provides that a contracting state shall designate a central authority to discharge the duties imposed by the convention. This standard has been implemented by statute through the creation of the National Adoption Committee in the Children's Act 2001, Part XII Section 155<sup>18</sup>. This is an Act of parliament passed in 2001 to make provision for parental responsibility, fostering, adoption, custody, maintenance, guardianship, care and protection of children; to make provision for the administration of children's institutions; to give effect to the principles of the convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child and for connected purposes<sup>19</sup>. The committee acts as a central authority charged with regulating international adoption as provided for in international law. Section 155 (2) specifically sets the functions of the committee to include formulating adoption policies; liaison role between adoption societies, government and other agencies; monitoring adoption activities and other functions conferred on the committee by the Children's Act<sup>20</sup>.

The establishment and operations of the adoption committee has further been reinforced by regulation through the children Adoption Regulations, 2005. Sections 1 – 7 of the regulations gazetted through Legal Notice No. 43 on 20<sup>th</sup>

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<sup>15</sup> Ibid Article 23 (1)

<sup>16</sup> Ibid Article 24

<sup>17</sup> Ibid Article 26 (1) (a) (b) (c)

<sup>18</sup> The Laws of Kenya, The Children Act 2001 Cap

<sup>19</sup> Kenya Law Reports

<sup>20</sup> Children Act 2001

May 2005 of the Kenya Gazette define the functions, membership, mode of choosing chairman and conduct of meetings of the national adoption committee.<sup>21</sup> The first committee was inaugurated in May 2005 with a membership of twelve individuals nominated by various bodies as prescribed in the Act.

### **Adoption societies and accredited bodies**

Article 6 of the convention provides for the creation and accreditation of bodies and public authorities that will conduct international adoption. In Kenya this provision has been implemented by statute, the Children Act 2001 Section 177, 178 and 179 and these public authorities/bodies are referred to as Adoption Societies. Further the process of registering, requirements for registration, and rejection of application for registration, renewal, cancellation and the day to day operations of the societies so registered are regulated by the Children Adoption Regulations 2005, Sections 8 – 21 and section 29.<sup>22</sup>

### **Requirements for adoption**

This has been implemented by statute as outlined in Sections 156, 157, 158, 159, 160, 161, 162, 163, and 164 of the Children Act 2001 and by regulations in Children Adoption Regulations sections 22 – 26. These sections provide for the way in which an international adoption application will be made; who qualifies to place an application; the procedure and manner to be followed in submitting application; the documentation necessary; identification of child; consents to be executed; placement of the child; appointment of guardian *ad litem*; the period in which child must stay with applicant before court proceedings commence; requisite reports to be availed to the court; and manner of court procedure. The conditions of rejection of an application are also outlined in the sections.

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<sup>21</sup> Kenya Gazette Supplement, Legal Notice No. 43, Adoption Regulations, 2005.

<sup>22</sup> Children Adoptions Regulations 8-21

## **Subsidiarity**

Both the CRC and Hague Convention require that where possible and as much as possible, children should be raised within their natural families or communities. As such attempts must be made to place the child locally before international adoption is considered. This requirement has been implemented largely by practice rather than through statute or regulation. Adoption societies are required to ensure that attempts have been made to place a child locally or find alternative care locally and international adoption only to be considered after all else has failed. The Children's Act 2001 favours local adoption over international adoption since the requirements are less stringent<sup>23</sup>.

## **Recognition, effects of the adoption and follow up**

To ensure that adoption orders from Kenya are recognised by receiving states, implementation has been ensured by legislation, regulation and practice. Through Statute, the Children Act Section 154 (1) provides that an application for adoption shall be made only to the High Court and specifically the Family Court Division. Sections 169 and 170 provide requires the Registrar – General to maintain an Adopted Children Register where all adoption orders are entered. Section 171 provides for permanency of the adoption order and prescribes the duties and responsibilities of the adoptive parents. In Regulations, section 27 (1) provides that an international adoption order shall only be made by the High Court. In an effort to legitimise and minimize fraud in the adoption process and enhance recognition by receiving states, the Adoption Committee and the Judiciary have agreed on a practice that all international adoption applications filed only at the High Court in Nairobi. This is after it was realised that applicants in stations outside Nairobi would take advantage of the lack of knowledge and awareness among the judicial officers on the international adoption process<sup>24</sup>.

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<sup>23</sup> Interview with Alex Wamakobe, Senior Children's Officer on 22<sup>nd</sup> August 2008 at Jogoo House

<sup>24</sup> Alex Wamakobe, Senior Children's Officer

Section 183 of the Act also empowers the Chief Justice to make such rules of court directing the manner in which applications to court have to be made and generally providing for matter of procedure and incidental matters arising from Part XII of the Act<sup>25</sup>. Section 163 (2) and Section 164 of the Act give the Court powers to make orders that enable supervision of the child after placement and that periodical reports on the progress of the child shall be furnished with a court or competent authority in the adopter's country. Such reports can also be submitted to the National Adoption Committee.

### **Cooperation**

Having acceded to the Hague Convention; and ratified the Convention on the Rights of the Child and the African Charter on the Rights of the Child, Kenya has not entered into any bilateral agreements with any other country. Interaction with receiving countries is based on the said conventions. However, there is constant communication, liaison, collaboration and consultation with the receiving countries through their missions in Kenya under facilitation of the Ministry of Foreign Affairs<sup>26</sup>. This is done through meetings, sharing of information and cross checking of documents provided by the applicants.

### **Challenges of Implementation**

#### **Resources**

The adoption committee operates through a secretariat within the ministry of Gender, Children and Social Services and financial allocation is within the ministry's budget which is done under strict budget lines and specific work plans. Resources are thus limited which has hampered the committee's operations as it cannot carry out independent activities like study tours and exchange programmes with other jurisdictions<sup>27</sup>. Lack of resources has also affected

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<sup>25</sup> Children Act 2001

<sup>26</sup> Ibid

<sup>27</sup> Interview with Alex Wamakobe, Senior Children's Officer, Ministry of Gender and Children on 22<sup>nd</sup> August 2008

training for the committee members and other stakeholders like judicial officers, children officers and other government officials, lawyers and adoption societies. Sensitisation and public education efforts to create awareness programmes cannot be conducted effectively as this require substantial amounts of money for logistics, information, education and communication materials and allowances for resource persons. Further, the respondents felt the committee is largely inaccessible and lacking in national coverage since its operations are limited to Nairobi<sup>28</sup>.

### **Structure of the adoption committee**

The committee as presently constituted, operates within the ministry's administrative structure which hosts the adoption secretariat. This structure is not adequate as it lacks autonomy and independence to act as a full fledged authority as defined in the Hague Convention. It is a creation of the Children's Act 2001 but to function as a full fledged central authority, the law should be amended to make it autonomous with permanent staff and legal mandate. Presently, it is weak and lacks legislative and administrative powers and capacity to adequately regulate and monitor adoptions.<sup>29</sup>

### **Networking and collaboration**

There is a lack of collaboration and coordination among stakeholders as every one carries out activities independently on their own with little guidance and consultation with the Committee. This is worsened by the lack of knowledge on the role of the Committee in international adoption process. The Committee is hardly known outside Nairobi since it lacks wider and broader national coverage.<sup>30</sup> Article 7 of the Hague Convention expects a central authority to share information and collaborate with other countries and the bodies that conduct adoption. On collaboration and networking, respondents interviewed felt that the committee does not share information and collaborate adequately with

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<sup>28</sup> Information from respondents

<sup>29</sup> Ibid

<sup>30</sup> Ibid

other bodies and countries; lacks capacity to formulate policies; perform its regulatory and monitoring function; and creation of awareness about international adoption. It was also felt that it has not set and or does not apply a uniform standard which has made it possible for adoption societies to take advantage of foreign applicants.<sup>31</sup> International adoption applicants are exploited financially in most cases having to part with huge sums of money to complete an adoption process.

### **High member turn over and capacity**

The committee since its inception has seen a number of the members from the nominating bodies leave. This is because once one leaves the employ of the nominating body, he or she ceases to be a member of the committee and fresh members are appointed who have little or no knowledge of the committee's role.<sup>32</sup> Since its inception in 2005, out of the twelve members at least four have left. This is a quarter of the membership and has affected the committee's continuity and ability to execute its functions efficiently. Ideally and for effectiveness, the members should complete the three years term, more in the committee's first year of operation. Further, not every member nominated to the committee is adequately competent and knowledgeable in issues of child rights and child protection.<sup>33</sup> This affects level of participation and quality of discussion in the committee's sessions. Persons nominated to the committee should be people of high morals and integrity and should possess some knowledge of current issues in child welfare and child protection.

As such, a majority of the respondents interviewed felt that the committee is not efficient in its service delivery; unfair in decision making leading to low levels of confidence in its ability to discharge duties in line with the requirements of the best interest principle in child protection. The committee was also viewed

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<sup>31</sup> Ibid

<sup>32</sup> Ibid

<sup>33</sup> Ibid

as unnecessarily strict and rigid at times to the detriment on the welfare of the child<sup>34</sup>.

### **Adoption Societies**

There are currently only five adoption societies approved to conduct both local and international adoption. These are Child Welfare Society of Kenya along Langata Road; Little Angels Network located Kilimani area of Nairobi; Kenya Christian Homes situated along Langata Road; Ark Cradle Centre in Kisumu and Kenyan to Kenyan Peace Initiative in Nairobi. Four of the five societies are in Nairobi and three are located along Langata road an area which is cheekily referred to as "Adoption Road"<sup>35</sup> On the number of societies, respondents felt that the five societies are inadequate to serve the whole country and many children who can benefit from adoption but live outside Nairobi are disadvantaged and cannot access or be accessed.<sup>36</sup> The adoption societies are approved to conduct both local and international adoption and the fact that they are not spread all over the country means limited access by many. With 8.6 million children estimated to live in absolute poverty<sup>37</sup>, there is ever an increasing need to reach them through strategies that enhance their protection. Adoption having been identified as one such strategy, the societies then should be more accessible with at least one in every province.

Due to few societies, respondents felt that the adoption process is not well facilitated. It was also felt that there is competition, mistrust and suspicion amongst the societies hindering collaboration and information sharing.<sup>38</sup> The mistrust and competition is due to the fact that the societies compete for the few international applicants. There is a feeling that each society believes the other will take away its clients and once a client has approached one, there are chances he or she will be fed improper information about the other societies. The

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<sup>34</sup> Officer at an adoption society

<sup>35</sup> Interview with Alex Wamakobe

<sup>36</sup> Data from Adoptive Parents

<sup>37</sup> Njoka, John Murimi and Williams, John Parry' A Technical Assessment of the Legal Provisions and practices of guardianship, foster care and adoption of children in Kenya, Nairobi, August 2008

<sup>38</sup> Interview with Tony Odera, former Legal Officer, Cradle Child Foundation, August 2008



cost of registering adoption societies and subsequent annual fees to conduct international adoptions was felt to be too high which could be a factor in the few numbers.<sup>39</sup> The initial registration fee to conduct international adoption is one hundred thousand Kenya shillings and renewal is fifty thousand shillings. Many child welfare agencies being non-profit organisations, find it difficult to raise the registration. Only a few with good sponsors and donors have been able to raise the money and be registered.

The societies are cited as relaxed and complacent in the implementation of requirements for international adoption. The vetting of applicants is not as strict as it should be or as is expected. It is felt some of the societies had misguided objectives and expectations and once they realized they could not meet these, they relaxed their practices and do not adhere to set standards.<sup>40</sup> At registration, the societies probably thought international adoption was easy and lucrative and they would make quick money. This has not been the case due to the oversight role of the adoption committee and the courts in making sure adoption orders are granted in a procedural manner. Due to this, societies have relaxed their enthusiasm and are not as keen as at the beginning.

The capacity of the staff working in the societies is not adequate for the task. The qualifications, competence, and general awareness of child protection in adoption are wanting and can be improved<sup>41</sup>. Social workers, administrators and case committee members should have background training in sociology or social work with a focus on family and child welfare, counseling and psychology. Further, they should have a basic knowledge of law generally and specific issues in international law as it relates to adoption. Currently, the adoption committee has set minimum standard of a basic social work training, preferably at degree level and experience in child protection. However, due to lack of close monitoring and regulation, these qualification requirements may not be followed strictly. Coupled with challenges of qualifications, there is also high turn over of staff living the societies which affect continuity and quality of service delivery. The

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<sup>39</sup> Adoptive parent

<sup>40</sup> Interview with Alex Wamakobe, Senior Children's Officer on 22<sup>nd</sup> August 2008

<sup>41</sup> Information from respondents

social workers in some societies hardly last one year which is detrimental to continuity as an applicant whose case is being processed has to deal with a new officer. Being charitable organisations, the societies are unable to offer competitive remuneration or train their staff so as to retain them hence the high turn over<sup>42</sup> Respondents interviewed felt that qualifications of social workers in the societies at times is doubtful and having no professional body, social workers lack self regulation which is necessary in a profession involved in child protection.<sup>43</sup> Self regulation for the societies and social workers is necessary to make them set their own standards and hold each other accountable. They can monitor themselves and take action against errant members through set disciplinary mechanism. Self regulation would supplement state regulation through the adoption committee.

### **Requirements for adoption**

Adoption from Kenya is perceived as bureaucratic, expensive, long court process and unfriendly courts.<sup>44</sup> Process is long, tedious and lack of information to prospective adopters and the public which can hinder international adoption.<sup>45</sup> In terms of the time line within which an application is processed, there was a general feeling that it takes quite a long time. Further, the three months mandatory bonding period was cited to be too long since no applicant can leave his/her employment or business for such long periods of time.<sup>46</sup> Applicants place their requests with a society, whose case committee must sit before the same is forwarded to the adoption committee which sits only once per month. An application will thus take at least a month to be processed and approved. Respondents felt that this gives an impression that Kenya does not want international adoptions.

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<sup>42</sup> Peter Kamau Muthui, Social Worker at Kenya Christian Homes Adoption Society

<sup>43</sup> Information from respondents

<sup>44</sup> Adoptive Parent in an interview

<sup>45</sup> Mr. Ahmed Hussein, Director, Children Services in a speech during the launch of Adoptive Parents Association of Kenya on 22<sup>nd</sup> August 2008 at Thomas Barnardo House

<sup>46</sup> Adoptive parent in an interview

The information on how and where to adopt in Kenya was reported to be available in the internet, from the children's department and adoption societies. However, this information was reported not to be adequate and that there is no proper understanding of international adoption particularly the legal implications. In securing consents, respondents felt that parents or guardians offering children for adoption are not properly counselled and briefed. Due to this, the parents assumed that their children will come back at some point after receiving "good education" and do not comprehend the permanent nature of adoption. In case where children are offered by a parent or guardian, the societies should ensure that the implications of the action are clear to guardian/parent. Should know that adoption is permanent and once a child is released and formally adopted, they cede all parental responsibilities and rights to the adoptive parents.

There is an agreement that a fee should be paid when applying for adoption which goes to the societies towards processing the application. The majority of the respondents felt that the fees charged by societies was low since it is difficult to adequately compensate the homes/societies for the cost of care of the children and that adoption is very involving in terms of time, travel and administration. Respondents also felt that the societies being charitable organizations, they deserve to charge a fee to maintain their operations. All respondents felt that the fee should be regulated by the national adoption committee and not the societies themselves to ensure no improper financial gain in the process. Adoption should not be commercialised since the societies are non-profit making organisations.

The legal fees paid to advocates to file adoption applications in court were rated as high or exorbitant, widely unpredictable and varied. It was also noted that individuals who seem to take an active role in adoption are those that are being paid, money is seen as the motivation and those who are paid usually hasten the process reducing the process to a business transaction.<sup>47</sup> Corruption and rent seeking behaviour may hamper child protection as social workers or children officers can be compromised to write favourable reports, back date

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<sup>47</sup> Tony Odera, former Legal Officer, The Cradle Child Foundation, August 2008

reports to assist in circumventing statutory requirements<sup>48</sup>. The process is open to abuse by advocates and adoption societies who may collude to gain financially.<sup>49</sup> To reduce legal costs, applicants who are able should be allowed to represent themselves in court. The office of the Attorney General should also be approached to provide legal aid to applicants who have the ability to support a child but may not be able to bear the extra burden of legal fees.

Respondents felt that it is only the national adoption committee and family court division that can ensure that children are not trafficked or abducted for financial gain under the guise of international adoption. The court and the committee can ensure that before an order is granted, the applicants have been adequately assessed to ensure suitability to adopt and that the receiving states are in agreement with the adoption. Thorough vetting by the adoption societies can also help limit the chances of trafficking in children. The partnering adoption societies in the receiving countries approved by the committee to conduct international adoption in Kenya were also identified to play a key role in ensuring that children are not abused or trafficked under the pretext of being adopted. Documentation, social and criminal background checks, police clearance reports and character references provided by applicants must be notarised by competent authorities in the receiving country and authenticated by government. Respondents however felt that there is always some risk and uncertainties about the documents provided by applicants and the challenge of technology was identified as posing a danger of forgery of documents by criminals.

### **Subsidiarity**

Internationally adoption should be a last resort when local adoption or measures to place child in its natural community have failed. However, the biggest obstacle to local adoption is the attitude of Africans particularly Kenyan society towards adoption; there is a misconception and negative attitude towards adoption and

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<sup>48</sup> Ibid

<sup>49</sup> Ibid

adoptive parents are perceived to have “bought” children and thus face stigma<sup>50</sup>. The Islam religion even outlaws adoption<sup>51</sup>. The negativity has led to poor local adoption rate compared to international adoption. The current ratio is approximately 60:40, that is, sixty percent international adoptions and forty percent local adoptions, which is not desirable as local adoptions should be much higher than the international ones. It is even more difficult for locals to adopt in comparison to foreigners<sup>52</sup>. The court process is also cited as a disincentive and discouragement to local adoption and actually perceived as ‘criminalising’ or ‘penalising’ local adoption, local applicants easily give up<sup>53</sup>. In a discussion with adoptive parents, it was felt that the legal fee is high and exorbitant to many local applicants hence the low rates of intake of adoption by Kenyans.<sup>54</sup> Respondents felt that there are genuine attempts to place children for adoption locally before international adoption is considered. A majority of international applicants were found to more readily accept children with medical conditions, disabilities or special needs that cannot be easily placed locally either because treatment required or service is not readily available and/or is expensive; locals also cited to attach stigma to children with such conditions.<sup>55</sup>

### **Post Adoption Follow - up**

Currently there is no possibility of post adoption follow-up by Kenyan authorities. The Hague places this responsibility on the receiving country. Adoption societies and agencies have signed memoranda of understanding that such reports will be sent regularly to Kenya but this is not the case and Kenya has no powers to follow up on this<sup>56</sup>. The respondents felt that a society in receiving country is expected to monitor progress of the child and make arrangements to protect the child in cases of abuse but once the child has left, there is hardly ever any follow

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<sup>50</sup> Ibid

<sup>51</sup> Ibid

<sup>52</sup> Ibid

<sup>53</sup> Adoptive parent

<sup>54</sup> Ibid

<sup>55</sup> Interviews with adoptive parents.

<sup>56</sup> Interview with Alex Wamakobe, Senior Children’s Officer on 22<sup>nd</sup> August 2008

up since there is no proper legal mechanism to ensure protection<sup>57</sup> The committee has no mandate to take action in case of abusive adoption relationships and by then the child is already a citizen of another country. Majority of respondents felt that orders issued by Kenyan courts are readily accepted by receiving countries but the child is in danger in cases of abuse since the order is irreversible and adoptive parent gains full rights over child<sup>58</sup>. The Chief Justice has not made the rules of procedure as provided for in the Children's Act Section 183<sup>59</sup>. These rules would streamline court processes and ensure uniformity in dealing with adoption applications.

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<sup>57</sup> Data from Respondents

<sup>58</sup> Ibid

<sup>59</sup> Interview with Alex Wamakobe, Senior Children's Officer on 22<sup>nd</sup> August 2008

## CHAPTER FIVE

### A Critical Analysis of the Implementation of International Adoption Standards in Kenya.

#### **Introduction**

The project aimed to assess the implementation of international adoption standards contained in provisions of international child protection instruments. Chapter one of the study contains the background of the problem, statement of the research problem and objectives of the study. It also illustrates the significance of the study, literature review, theoretical framework, hypothesis and describes the research methodology. Chapter two of the study focuses on the international child protection regime. The chapter begins by outlining the difference between international law and municipal law. It discusses the sources of international and process of treaty making. Forming a larger part of the chapter is a discussion of international child protection instruments and the specific provisions that relate to international child adoption. Chapter also contains the specific standards that are the subject of the study. The chapter also has a brief section on the process of adoption in Kenya.

Chapter three is on adoption, its philosophy and role in child protection. Specifically, the chapter gives a definition of adoption and the different forms it takes. It also outlines the principles and philosophy behind adoption and the elements that constitute it. The chapter also analyses the role of international adoption in child protection, international adoption as a form of migration and its relationship to culture and identity. Chapter four of the study contains the outcome of interviews and discussions held with key stakeholders in the international adoption process in Kenya. It discusses and highlights views of respondents in the study which included lawyers, social workers, children officers and administrators of adoption societies. Specifically, it outlines outcomes of the study on how Kenya has implemented the international standards discussed in chapter two.

## **Critical/Core Issues raised in the chapters**

### **Presence of vulnerable children in need of care and protection**

It is estimated that 8.6 million children in Kenya live in absolute poverty. This is a consequence of poor economic growth in the last two decades, HIV/AIDS scourge which has left many children orphaned and natural calamities like floods and displacement due to clashes and conflict experienced in the country. In response to the vulnerability of children, adoption and foster care has been identified as strategy of offering care to the children in need. It is argued that it is in the best interest of the child to be placed in a foster or adoptive home rather than live in absolute poverty or in an institution.

### **Need for effective regulation and monitoring of international adoption**

International adoption is complex as it is a migration process with cultural, legal, political and diplomatic considerations. To ensure the safety and welfare of the child, there is need for its regulation through implementation international instruments. International adoption can easily be abused by individuals who traffic in children. As such Kenya, is signatory to key the Convention on the Rights of the Child through ratification and the Hague Convention on Intercountry Adoption through accession.

### **Implementation strategies and challenges**

Being a signatory to the key conventions, Kenya has implemented the provisions largely through legislation and practice. Implementation through legislations is popularly referred to as domestication and is the process of enacting an act or statute with the provisions of the international treaty. Implementation by practice is the development of policies and regulations to enable smooth implementation of issues not enacted in law. Implementation efforts have been hampered by inadequate resources, political will among others.

The Kenya government through provisions of the Children Act 2001 provides for guardianship, foster care and adoption as alternative ways of caring for children without biological parental care and those whose parent, though are still alive cannot care for



them<sup>1</sup>. The National Policy on Orphaned and Vulnerable Children has also identified guardianship, foster care and adoption as one of the areas that need strengthening in order to ensure that OVC are protected and given a chance to develop their full potential. To implement the Children's Act 2001, which has incorporated provisions of the Convention on the Rights of the Child which the government ratified in 1990; the Department of Children Services set up an Alternative Care Section to oversee the implementation of foster care, guardianship, adoption practices and the running of Charitable Children Institutions in Kenya. Further in 2005, Adoption Regulations were developed which provided for the formation of the National Adoption Committee and the same year the Adoption Secretariat was set up to coordinate adoption work in the country.

In 2006, the cabinet approved the ratification of the Hague Convention on the protection of Children and Cooperation in Respect of Inter-country Adoption and on 12<sup>th</sup> February 2007, the government placed its Instrument of accession in The Hague and the Convention came to force in the country starting 1<sup>st</sup> June 2007. These actions indicate the Government's appreciation of the importance of adoption as an intervention and strategy for providing alternative protection to vulnerable children; and a willingness to put in place mechanisms to regulate adoption in line with international standards.

The project aimed at assessing the strategies and how Kenya has performed in the implementation of international standards in regard to international adoption. It assessed how the standards are made operational and available enforcement mechanisms and the impact of implementation of the standards on the protection of internationally adopted children. The project examined a legal issues and Cattrijsse Lieve argues that a dialogue focusing on legal questions leads to an approach based on the sociology of law; where the research subject is reconstructed through interdisciplinary dialogue of phases which are not chronological and are not independent from each other, but mutually reinforce one another<sup>2</sup>. The phases in this case would constitute standard setting; implementation and social reality<sup>3</sup>. Standard setting phase refers to the process of creation, the drafting and

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<sup>1</sup> Terms of Reference for the Technical Assessment of the Legal Provisions and Practices of Guardianship, Foster care and Adoption of Children in Kenya.

<sup>2</sup> Cattrijsse, Lieve et al., **From Standard Setting to Implementation and vice versa?** Towards a coherent analytical framework for the interdisciplinary research study "Human Rights of Children. Implementation and Monitoring through participation". , June 2002, Brussels. P.30

<sup>3</sup> Ibid p.31.

the formulation of norms; implementation phase refers to all the actions that can be or undertaken in order to secure the correct application and monitoring of the standards and the social reality phase describes the actual daily situation of people and the way they experience the standards and their implementation<sup>4</sup>. There is an interaction between the social and the legal standard. The international standards provided for in the treaties encourage certain actions and conduct by society, but does not determine the actions. The treaty rule only offers a range of possibilities, presents itself less as a means of coercion, but rather as a means of action<sup>5</sup>. The standards are therefore ideals to aspire, desirable conditions to be upheld in child protection, places responsibility on governments.

### **Implementation Strategies**

Parmentier defined definition as “the totality of actions to give effect to human rights standards, (a) at distinct levels of interaction, (b) by a number of different agents, (c) who can make use of multiple strategies”<sup>6</sup>. These are the strategies that put the standards into operation and practice. It is a process of breaking down the convention provisions into executable and measurable parameters. The government has used two main strategies; Legislation and Practice to implement the standards provided for in the international instruments.

### **Legislation**

Legislation or statutory law is law which has been promulgated or enacted by a legislature or other governing body. It may refer to a single law or the collective body of enacted law. In Kenya, the law making organ is the legislature or parliament and before the law enacted takes effect, it must receive presidential accent. Every law enacted must be in tandem with the Constitution of the Republic of Kenya. Kenya employs the dualist approach which incorporation or transformation by legislation, where an international treaty must be given effect by incorporating the rights and obligations set out in a treaty

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<sup>4</sup> Ibid. p.31

<sup>5</sup> Ibid. 29

<sup>6</sup> Parmentier, S., *The Significance of Mechanisms to Monitor Human Rights at the International Level*. in Catrijsse, Lieve et al., *From Standard Setting to Implementation and vice versa? Towards a coherent analytical framework for the interdisciplinary research study “Human Rights of Children. Implementation and Monitoring through participation”*. , June 2002, Brussels. P.30

into domestic law through legislation. In this category, a statute may directly enact the provisions of the treaty by setting out the treaty as a schedule to the enacting legislation or, a statute may transform the treaty into domestic legislation by employing its own substantive provisions to give effect to the treaty without enacting the text of the treaty itself.<sup>7</sup> This is popularly referred to as domestication of the provisions of a treaty.

The Children's Act became law in 2001 after over 10 years of discussion and lobbying. Its provisions were primarily based on the Convention on the Rights of the Child which Kenya ratified in 1990. The Act replaced the Children and Young Persons Act and the Adoption Act which are now repealed. The Adoption Act never had provisions for international adoption which is now provided for in Children Act Part XII Section 160. Some of the provisions of the Hague Convention were implemented through the Adoption Regulations, 2005 that were developed after the passing of the Children's Act in 2001.

A sound legislative base is fundamental, though of course not sufficient for preventing abuses of intercountry adoption.<sup>8</sup> Children where legislative provisions are non-existent, inadequate or plagued with gaps and loopholes are clearly at special risk<sup>9</sup>. Legislation is important for setting criterion and stipulating procedures and rights and standards provided for in law provide a stronger protection for children's rights since it is possible to enforce the standards by legal action. Through legislation the government has set standards and mechanisms to regulate and monitor international adoption.

Systems to conduct and regulate international adoption have been put in place by the creation of a Central Authority in this case the national Adoption Committee which is a statutory organ under the Children's Act. Further, five adoption societies namely Child Welfare Society, Little Angels Network, Kenya Christian Homes, Ark Cradle Centre and Kenyan to Kenyan Peace Initiative have been licensed and approved to conduct international adoptions. To meet the conditions of the Act, the societies must partner with foreign registered adoption agencies but which must be approved by the National Adoption Committee. The Committee has so far approved nineteen (19) foreign adoption

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<sup>7</sup> Brownlie, I., *Principles of Public International Law*, Clarendon Press, 1990 p.48

<sup>8</sup> 'Innocenti Digest, Intercountry Adoption', United Nations Children's Fund (UNICEF), International Child Development Centre, Florence Italy, 1998. p. 8

<sup>9</sup> Ibid p.8

agencies to operate in Kenya in partnership with the Kenyan Societies. The Committee has set standards for the societies and reporting procedures that must be met before registration and or renewal of operating licenses. The Act also prescribes through Adoption Regulations who can adopt and the process of applying to adopt.

### Practice

These are policies and practices that are required to implement measures that will ensure protection of the rights of the child in the international adoption process. Various policies and practice standards have been developed to aid in the implementation of the standards. The subsidiarity principle which requires states to ensure that children live with their biological parents or families and communities or be adopted locally and international adoption be a last resort has been implemented through practice. The government in 2007 developed the Kenya National Social Protection Strategy under the Ministry of Gender, Sports, Culture and Social Services which proposes cash transfers as the core social protection intervention in Kenya.<sup>10</sup> Social protection is an important framework in which social transfers are accompanied by an integrated range of support services and policies that focus on family support, child protection, alternative care and livelihoods promotion<sup>11</sup>. Further, the government developed the National Policy on Orphans and Vulnerable Children which identified guardianship, foster care and adoption.<sup>12</sup>

The National Plan of Action for Orphaned and Vulnerable Children was further developed as a plan to operationalise the policy; and its key strategic area for OVC intervention is that of strengthening families' capacities to care for children within their families and communities.<sup>13</sup> In the Cash Transfer for OVC programme, developed is a government initiative in dealing with children without care of their biological parents and those who are still under the care of their biological parents but are vulnerable. The programme identifies poor families fostering or living with OVC and provides them with a monthly cash subsidy of Kshs. 1,500 the objective being to improve the socio-economic welfare and therefore the ability to care for the children. This child and family welfare

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<sup>10</sup> The Kenya National Social Protection Strategy (Draft), Government of Kenya, MoGSCSS, November 2007

<sup>11</sup> Ibid

<sup>12</sup> Republic of Kenya, National Policy on Orphans and Vulnerable Children, November 2005, p.2

<sup>13</sup> Republic of Kenya, National Plan of Action for Orphans and Vulnerable Children, 2005

policy aims to maintain a child in his or her birth family and thus avoid possibilities of being adopted internationally. Another practice is the requirement that all international adoption applications be filed at the High Court in Nairobi. This is to avoid the filing of fraudulent and defective international adoption in courts in other parts of the country where supervision and monitoring by the government may be limited. The Judges at times require the Department of Children Services to provide to provide additional or subsequent reports before making an order in cases where there is doubt on the suitability of applicants.

### **Impact of implementation of international standards**

Kenya's legislation concerning children has moved forward dramatically since the passing of the Children's Act and the regulations concerning adoption and the ratification and accession to the various international instruments. This has led to better and improved protection of children through creation of legal standards to be upheld and enforced which place obligations upon the government. The government and stakeholders can therefore be held accountable and responsible for their actions. There has also been an accompanying development of administrative structures in the form of national adoption committee and its secretariat to develop policies, regulate and monitor international adoption.

International adoption structures have been put in place through the registration and approval of adoption societies and foreign agencies to conduct international adoption in Kenya and setting of standards and requirements to be met when applying for adoption by a foreigner. There is enhanced cooperation and collaboration between the courts, government departments, agencies conducting adoption and with receiving countries through their embassies and foreign missions. There is also a degree of awareness amongst applicants, stakeholders and the public.

### **Challenges of Implementation**

#### **Enforcement and Monitoring**

Despite the legal systems in place, it is felt that Kenya can do better in implementing the provisions of the key international instruments particularly the Hague Convention. Kenya

as a sending state is not very attractive to foreigners due to a perceived bureaucratic red tape which makes the process drag for long periods and exposing it to corruption or rent seeking behaviour by lawyers, officers of adoption societies and government officials which can compromise the best interests of the child in the long run. The national adoption committee is viewed as lacking ability to regulate, enforce and monitor adoption process. This is because it lacks technical and operational capacity and legal power to enforce the standards. The committee is also perceived to be unable to effectively perform its role of policy formulation and awareness creation on international adoption which has led to poor understanding of international adoption and its legal implications.

The five adoption societies so far registered were found to be inadequate as the three active ones are all located in Nairobi with little coverage of other parts of the country which puts children up country at a disadvantage. The societies were found to compete amongst themselves, mistrust and are suspicious of each other. Issues of capacity of the staff in the societies also make them handicapped to ensure compliance with standards. The monitoring of the adoption process a challenge as the Committee and the Societies have no proper mechanisms to ensure that applicants are indeed capable. There is reliance on the information and background checks provided by authorities of the receiving country and the partnering adoption society.

The absence or insufficiency of courts and administrative services in a position to ensure the proper implementation of enacted legislation significantly increases the risk of abuse of international adoption.<sup>14</sup> In some countries, judicial systems are so overloaded that the court decision on intercountry adoption is reduced to a rubber stamping exercise rather than a careful examination of the situation and documents. There may be no judges with special competence in this sphere and social departments may be unable to carry out tasks necessary for adoption.<sup>15</sup> The situation may be the same in Kenya where judges have to handle numerous cases leading to a backlog and delay in processing matters. Judges also face considerable difficulty in exhibiting consistent practice as there are no Practice Rules governing the detailed procedures for adoption, which are very important

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<sup>14</sup> 'Innocenti Digest, **Intercountry Adoption**', United Nations Children's Fund (UNICEF), International Child Development Centre, Florence Italy, 1998. p.8

<sup>15</sup> Ibid p.8

when you have the Family Court Division judges changing every two or so years.<sup>16</sup> There has always been a shortage of Children Officers and even those present are not very well versed with international adoption process. Adoption orders are permanent and follow up when the child has left the country is almost no existent. The Courts and both the Committee and the Societies do not have the capacity to monitor the situation of the child once it has left the country since the child acquires a new nationality.

### **Resources**

Implementation has financial and human resource costs to carry out specific programmes and policies. Due to limited funding and strict budgetary allocations, the government has not been able to carry out deliberate programmes aimed at creating an effective operational environment. Training for capacity building of judicial officers, adoption committee members, children officers and other stakeholders have been limited. Further awareness campaigns and public education programmes have not been conducted in desirable levels. This has also affected administrative and legal reforms that could be carried out to enhance regulation and monitoring.

### **Political Will**

Implementation of international law in Kenya requires legislation through enactment of specific statutes and development regulations. It took over ten years to develop and enact the current Children's Act 2001. To amend it and have relevant provisions included will take a long time. Indeed, the adoption committee should be transformed into a central authority with more administrative and legislative powers than it has now. This transformation requires amendments to the Children's Act which will take sometime as it has to pass through parliament. Parliament has its own calendar and procedures of conducting business and it has been accused of relegating children matters to the periphery causing delays in legislating crucial matters.

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<sup>16</sup> Williams, John Parry and Njoka, Murimi John, *A Technical Assessment of the Legal Provisions and Practices of Guardianship, Foster Care and Adoption of Children in Kenya*. Nairobi, August 2008. p.31

### **Outcomes and of objectives of the study**

As outlined in chapter one, the study aimed at creating a level of awareness on international adoption and need to for international instruments to regulate the process and ensure the children are protected. Specifically, the study aimed to identify standards set in the international instruments and determine to what extent Kenya has implemented the same to enhance child protection. The study objectives have been met since the outcome offers insights in the international adoption process and its role in child protection. More importantly, the study has identified the key two international instruments that regulate international adoption. These are the Convention on the Rights of the Child and the Hague Convention on Intercountry Adoption. The study has also outlined the major standards set in the instruments in regard to international adoption.

### **Outcomes and the hypotheses of the study**

The first hypothesis of the study was that the practice of international adoption leads to the promotion and protection of the rights of the child. The second was that the existing international legal regimes are limited in their protection of internationally adopted children. The third was that structures put up by Kenya are adequate in ensuring protection of internationally adopted children. The first hypothesis has been demonstrated by the fact that Kenya has over 8.6 million in need of care and protection. That is, they lack adequate services critical for their development including access to health, education and parental care or love. If done professionally and with the best interests of the child being the primary consideration, international adoption accords a child access to the said services and family environment which it may not otherwise have. The second hypothesis is demonstrated by the fact that some countries may not be signatories to the international instruments hence not bound. Further, even the countries that are signatories may claim sovereignty whenever they fail to implement or may have serious challenges in implementing the standards. The biggest limiting factor of international instruments is implementation and enforcement. The third hypothesis is demonstrated by the fact that Kenya has put in place mechanisms to comply with the international instruments. However, the adequacy of the mechanisms and structures are hampered by several challenges discussed earlier.



## **Policy Interventions/Recommendations**

International adoption has become an important strategy for child protection, particularly for those with medical conditions and special needs and cannot be placed locally. With the challenges of globalisation, collapse of the family and community systems, child trafficking, child abuse and other forms of harmful practices against children; there is need to revamp the international adoption process in Kenya. There is need for specific policy interventions aimed at improving the process to ensure promotion of the best interests of the child and at the same time meeting the needs of the applicants and the country's protection strategies. Ratifying, acceding to and domesticating international instruments alone is not enough, there is need to develop deliberate policy responses to seal gaps and loopholes not met by the provisions of the instruments and operationalise the standards. Further, the Children's Act to be implemented must be broken down into acceptable, understandable and community friendly interventions that are practical, workable and addressing specific protection needs. The process of implementation should be seen as a continuing process of development and improvement and contracting states should continue to evaluate the operation of the conventions within their domestic systems and consider ways in which to improve the functioning of the convention. As such, there should be a continuous review and improvement on the measures through use of feedback, record of good practices and lessons learned so far.

## **Administrative and Legal Reforms**

The national adoption committee be transformed into an authority with budgetary allocation, legislative and administrative powers to enforce standards. It should have permanent staff either seconded from the Children's Department or recruited competitively. Review of the Children's Act 2001 be speeded up and give stakeholders a chance to provide possible inclusions and amendments to enhance child protection in international adoption. Department of Children Services should have a rigorous and efficient data collection mechanism which will assist in monitoring the adoption process. There is need for greater collaboration with Immigration Department and Foreign Missions in the issuance of travel documents to adopted children. To this end,

Immigration Officer should be co-opted to sit in the national adoption committee to act as liaison.

### **Awareness Creation and Sensitisation**

Create awareness on adoption both at the local/community and national levels. Sufficient publicity and information surrounding the process of international adoption and its requirements be made available to the public. The enlisting of the support of the media in public education campaigns will enhance awareness creation.

### **Capacity Building and Training**

The adoption process needs highly competent and qualified personnel in government and the societies. There should be attempts to build the capacity of the practioners from the social workers, managers of the societies, children officers, lawyers, judges and even adoptive parents. This should be aimed at equipping the individuals with skills in child protection, child rights, counseling, international instruments, basic legal requirements and practice in other jurisdictions. Study tours of other jurisdictions to share knowledge and challenges which can help develop best practice principles. Further, the government should lobby universities and other training institutions to include adoption in its courses as an emerging issue in family and child welfare courses. Lobby for increased budgetary allocation to the Department of Children's Services and employment of more children officers.

### **Adoption Societies**

To enhance accessibility to more children and parents, there is need to approve more societies to operate in other regions of the country. There is need to have at least one society in every province or if one is approved in Nairobi, it should show that it has capacity to cover at least one more province and or to partner with a child welfare agency in at least one province. There should be frequent inspection of the societies to assess their systems, procedures and quality of service delivery to applicants. To enable self regulation, the Societies and all private parties involved in the process should develop a code of conduct. This will create ethical standards to be adhered to, penalties for misconduct either by an institution or individuals in the process.

### **Court Process**

Currently international adoption applications can only be made at the family court division of high court in Nairobi. While the intention of this ensures compliance, it has created a backlog of cases, numerous adjournments and increased the costs of the process. The chief justice should gazette the practice rules which will streamline the process and allow for filing in the provincial headquarters. Need for training of judicial officers and lawyers on adoption and particularly international adoption.

### **Local adoption**

There is need to demystify and popularise local adoption among the locals. Due to legal costs involved, many locals have shied away from the process. As such, the courts should encourage self representation by applicants who are capable of doing so to help reduce costs.

### **Cooperation**

Internal cooperation between Department of Children Services, societies, lawyers and other stakeholders through effective communication and sharing of information. Cooperation with other jurisdictions and authorities in those jurisdictions be enhanced through exchange of information, signing of bilateral agreements, memorandum of understanding and study tours.

# CHAPTER SIX

## Conclusions

### The Past of Adoption

The concept and nature of adoption has evolved over time. Adoption was originally an informal, private transaction between parents or caregivers and those who wished to adopt. In many African settings, able community members provided care for orphaned or children whose parents could not care for. There was no change of identity of the child and both the biological parents or guardians were known to the “adoptive parents”. The child maintained relationship with the guardians or parents. In a sense, this was a form of adoption which focused on the welfare of the child. It aimed at providing a family for the child and offering services or meeting needs that it would not access if it lived with the parents or guardians. I can recall that my parents at any one time usually had two or three orphans living with us until such a time that they would be able to support themselves. Adoption in the strict sense of the term was not common as child abandonment was rare or unheard of and the poverty levels were not as high. Community structures were still strong and people would rely on relatives and the community for support. Young girls conceiving outside wedlock were looked down upon but would rely on their relatives particularly aunties and grandparents to take care of the babies.

However, with time adoption evolved and it became an instrument to meet the needs of adults. Childless and infertile couples would adopt infants and newly born babies. In most cases, the adoptive parents would make private arrangements with those giving away the children through an intermediary. The adopters preferred babies to make believe that they had given birth to their own child. Adoption was secretive and sneered upon by society. The regulation by the authorities was ineffective as the legislation in the form of the Adoption Act was inadequate. Further, adoption was conducted in a very secretive manner as majority did not want to go to court. The courts too were really unfriendly to the adoptive parents and the child. I recall an instance in 2000 before the passing of the Children’s Act, I was attending an adoption matter in court as a social worker representing Thomas Barnardo House. The presiding magistrate decided to hear all cases in open court including our adoption case. We sat in court with all manner of

offenders and to make matters worse our case was listed last. The baby kept crying and the lady magistrate was not amused and the parent had to walk out several times to feed it. After spending the whole morning in court, the magistrate asked the advocate to take another date when the case would be heard. This was frustrating for everyone particularly the applicants and illustrates how our courts then were unfriendly.

The secretive and poor regulation of adoption meant that documentation and official statistics were hardly available. The adopters and everyone involved in the process confused the concept of confidentiality with secrecy. Secrecy is a situation where something is done in a clandestine, suspicious and fraudulent manner to avoid detection and possible consequences of an action. Confidentiality on the other hand is a professional practice. Those involved are bound to keep certain aspects of the process as secrets to protect the individuals and the integrity of the process. There was never adequate counselling of applicants to understand the implications of an adoption. There was a stress on having normal children, that is, adopters preferred to have children who were in good health suffering no disabilities and ill health. Children with deformities, disabilities and poor health never got a chance to be adopted.

### **The Present Situation**

The current practice has two fold objectives, to meet the needs of increasingly vulnerable children and to offer childless couples with an opportunity to experience parenthood. Adoption is a response to the break down in community structures that provided alternative care to children in need of protection. It is a strategy to deal with the effects of modernization, globalisation and economic stagnation of recent past which have left children vulnerable as their natural guardians cannot provide adequate care. It is largely an altruistic response to plight of orphans of war and HIV/AIDS, abandoned children and those suffering poverty. There are fertility problems particularly in receiving countries and since the cost of treatment is very high, couples are opting for adoption as a means of having children. With HIV positive individuals, adoption is the best way of having children. Adoption is thus becoming more popular than it was in the past and it will continue to be. While in the past adoption was largely done by locals, the present has

seen more foreigners adopting local children. It is also characterised by those already having their biological children applying to adopt

Due to increase in and the nature of current adoption practice, there is more regulation both at national and international level. Adoption is faced with possibilities of child abuse, sale, abduction and trafficking in children. Conflicts resulting in mass movement of people have created millions of unaccompanied, separated and orphaned children who need care and protection. These children are especially in danger as they are in a foreign land either with relatives or strangers who are themselves made vulnerable by their asylum status. Adoption is also taking place in an environment of more awareness of child rights and human rights issues. International adoption must be regulated as a way of eliminating abuses and improving the process practice. States are coming up with more stringent measures to regulate and monitor the process. Adoption is currently more formalised and permanent process than it was before. There is also more openness in adoption and documentation of the details of the adopters and the adopted child has made more data available. Though not very up to date, it is possible to access some data on how many children have been adopted and to where they have been adopted. Secrecy has been replaced by confidentiality of the process.

International adoption seems to be a preserve of the developed countries. A majority of applicants are from the developed countries seeking to adopt children from poor developing countries. With it has come what the media is referring to as celebrity adoptions where movie stars and those with high status in the west walking into Africa and walking away with a child. Due to their status, these celebrities are never vetted and their ability to care for the children is never verified. It must be appreciated that life is not all about having unlimited access to material things which the celebrities can avail to the child. The care and protection of a child involves more of emotional support, love and safety. With the trend of suicides, drug and alcohol use and abuse by celebrities, it is obvious the ability of the celebrities to provide a safe, secure, emotionally stable environment is in great doubt. Adoption as practiced today is rapidly becoming a commercial venture where individuals establish charitable organisations and child welfare agencies and quickly turn them into adoption agencies. This has taken away the humanitarian and welfare nature of adoption. A positive side of international adoption is

that it has given a chance to children with disabilities, deformities and of ill health. Some international applicants have shown preference for special needs children like those born HIV positive, have difficulties walking, talking and other needs. Previously and in local adoption, these children never stood a chance and were condemned to life in institutions and orphanages.

Adoption particularly international is now a political issue since it is a form of migration and the impact on countries welfare services like health and education. Hard liners against international adoption in receiving countries claim adopted children are a strain on their welfare services which are already strained. However, what would be the difference if the adoptive parents were to have one or two children of their own? It is also argued that it is a way of easily letting in immigrants into the west. There are further politics of human rights and child rights, trafficking, abduction and sale of children and their close relationship and linkages with international adoption

Race, identity and culture are also key concerns in international adoption. Black children adopted into white communities naturally are more conscious of their identity due to their minority status in the new environments.

### **Future Prospects**

Adoption and particularly international adoption will continue to increase. The numbers of applicants and the quality of the adoption will certainly rise. Quality here refers to the ability of the applicants to be able to provide adequate care to children, especially special needs children. With no respite in the HIV/AIDS scourge and continued economic meltdown in sending countries like Kenya, there will be an increase in numbers of children in need. There will thus be a corresponding rise in number of adoptions. Consequently, the process will become more commercialized than it is now because not all the children will be absorbed into children homes or under the care of institutions approved to conduct adoptions. I see a scenario where individuals will be involving themselves in this process illegally to make quick bucks. This will greatly expose the children to abuse, exploitation and trafficking. There should be a corresponding public education and awareness campaign on adoption, particularly intercountry adoption so that the citizenry can have knowledge on the process and its implications.

With more and more women becoming senior executives devoted to their careers, adoption will be on the increase. Nine months pregnancy period and the months spent lactating is a long time for a career women. This period is seen as a lost opportunity for growth, promotion and career development. There are also companies that have unwritten policies not to employ married women in certain positions or not employ them at all.. This is because of the financial and human costs of the maternity period when she is on leave. This has made many career women consider adoption as an option since they do not have to go through the nine months pregnancy period and subsequent leave which threaten careers. There is also a fear of contracting the HIV AIDS virus and to avoid this couples who are positive or one is positive will resort to adoption.

The world is experiencing major developments in corporate social responsibility where companies are obliged to give back to the communities where they do business and make profits. It is not only moral and ethical, but is good neighbourliness and helps win trust and customer or brand loyalty. Companies are building schools, roads, hospitals, water projects and sponsoring all forms of community welfare programmes. Similarly, successful individuals and personalities are giving back to society through sponsoring children from poor backgrounds for education at primary school, secondary school and tertiary levels. Instead of just sponsoring the children while they stay in institutions, many individuals will opt to adopt them and give the children a family life experience. This form of adoption, what some refer to as 'leisure adoption' will become popular.

There is need and there is going to be more and tougher regulation for international adoption. Due to politics of human and child rights countries will come up with measures to ensure international adoption is not used as decoy for child trafficking. There is also increasing pressure to ensure greater protection for children and this can only be done by regulation and closer monitoring. Receiving states however will most likely come up with more protectionist laws to curb international adoption. If the development of tougher immigration laws in Europe and America are anything to go by, the same will be done for international adoption as it is perceived as a form immigration. Protectionism is a concept that is gaining momentum in the west as it is being applied in trade and commerce and sports where anything going into the west is subjected to stringent measures.



The argument of race and cultural identity has featured prominently and will continue to. There are claims that the world is becoming globalised into a village where cultures will become one with little differences. However, there is evidence to the contrary that cultures are still far apart. It is only travel and information sharing that has become more globalised but there is increasing nationalism and erection of barriers to cultural integration. As such, black children adopted in white communities will continue to be a minority who will suffer an identity crisis later in life. Like test tube or cloned children who will one day wish to know who their parents were, adopted children too at some point in adulthood will want to know their origins. This is an issue adopting parents must be alive to and deal with effectively.

Despite the challenges posed by international adoption, it is a viable strategy to offer children in need opportunities for normal lives. It accords them family life and access to basic services crucial for their growth and development. The challenge is to stakeholders not to demonise the strategy but to find ways of regulating it and coming up with mechanisms to make it work. It is a better option than growing up in a children's home or in squalid conditions. Of course not every child will be adopted and the government must come up with strategies of responding and dealing with vulnerable children as it has the primary responsibility to provide basic welfare services and create an environment in which parents, guardians and communities can make create or earn enough resources to care for their own children.

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## Conventions

African Charter on the Rights and Welfare of the Child, 1990.

The Hague Convention on the Protection of Children and Cooperation in respect of International Adoption, 1993.

United Nations Convention on the Rights of the Child, 1989

Universal Declaration of Human Rights, 1948

The Vienna Convention on the Law of Treaties, 1969

The Permanent Court of International Justice Statute

The 1986 United Nations Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption, Nationally and Internationally, Article 17

Respondent Number \_\_\_\_\_

Dear Respondent,

The Government of Kenya has ratified the African Charter on the Rights and Welfare of the Child, United Nations Conventions on the Rights of the Child and the Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption. I am conducting this study to assess Kenya's implementation of these instruments to safeguard and promote the welfare and rights of children in intercountry adoption. Please answer the questions as sincerely as you can where possible.

Thank you for taking your time to answer the questionnaire.

Daniel Ouma Ogol



1. Please tick as appropriate

Advocate      Social Worker      Adoptive Parent      Children's Officer      Civil Society

2. Is Kenya a preferred source of children for international adoption? Yes      No  
Please explain your answer.

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3. Is the information on where to apply to adopt a child in Kenya readily available?  
Yes      No

If yes proceed to Q. 4, if no proceed to 5.

4. Where would you get this information?

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5. How would you rate the services of the institutions where children are found

	1	2	3	4	5
Reception					
Confidentiality					
Information on adoption process					
Condition of the children					
Documentation					
Interviewing					
Fees charged					
General staff competence					
Process timeline					

Key: 1- Very Good, 2 – Good, 3 – Satisfactory, 4 – Poor, 5 – Very poor

6. Are the number of institutions registered (foreign and local adoption societies) to conduct international adoption in Kenya adequate? Yes      No  
Please explain your answer

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7. How would you rank the following considerations (in order of importance) used to consider/identify a child for international adoption?

	1	2	3	4
Age				
Gender				
Abandonment				
Separation from parents				
Orphaned				
Medical condition				

Key: 1 – Very Important, 2 – Important, 3 – Not very Important, 4 – Not important

8. Are there any other factors other than the above used in considering a child for international adoption? (Please explain)

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9. Are there any attempts made to place a child locally before considering international adoption? Yes  No

Please explain

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10. How would you rate the services of central authority (National Adoption Committee) in terms of?

	1	2	3	4	5
Efficiency					
Fairness					
Best interest principle					
Accessibility					
National coverage					
Information sharing					
Collaboration					
Policy formulation					
Awareness creation					
Monitoring/Regulation					

Key: 1- Very Good, 2 – Good, 3 – Satisfactory, 4 – Poor, 5 – Very poor

11. Do you have confidence in the committee's operations in regulating and monitoring international adoption process? Yes No

Please explain

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12. Are you aware of any bilateral or multilateral agreements signed between Kenya and any of the receiving state(s)? Yes  No

If yes please name the countries

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13. What are the measures taken (if any) to vet applicants in order to ensure the children are protected from potential abusers?

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14. What binding documents do applicants provide from their host countries on application?

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15. What safeguards does Kenya have to ensure child acquires full rights in the receiving country on adoption?

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16. Do applicants pay any fees to the institutions when applying to adopt? Yes  No

17. How would you rate the charges?

Low  Fair  High  Exorbitant

Please explain

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18. Who regulates the fees charged?

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19. In your opinion, do you think there should be any charges for adoption services?

Yes No

Please

explain

your

answer

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20. How would you rate the legal fees charged by advocates

Low  Fair  High  Exorbitant

21. What measures are there to combat trafficking, abduction, sale and improper financial gain under guise of adoption?

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22. Is the Adoption order granted by Kenyan courts recognized by receiving countries?

Yes  No

21. If yes to above, how is this ensured?

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22. If answer is No to 22 above, what should be or is done to ensure the receiving country recognizes the Kenyan adoption order?

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23. After the adoption, are there any further orders for monitoring/follow up once the child leaves Kenya?

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24. Who does the monitoring?

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25. What is the frequency of the monitoring/reviews?

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26. Where are the monitoring reports submitted?

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27. Which state takes action in case of abuse in an adoption relationship?

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28. What recourse does a child have in cases of abuse or cannot fit in their new environment?

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29. What recommendations would you suggest to improve international adoption process to enhance child protection?

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30. Any other comments

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**THANK YOU FOR TAKING YOUR TIME TO FILL THE QUESTIONNAIRE!**